Supreme Court, U.S.
FILED

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No. _____

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In The

# Supreme Court of the United States

WAYNE AINSWORTH, et al.,

*Petitioners,*

v.

PHILLIP STANLEY, COMMISSIONER,
NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS,

*Respondent.*

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The First Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Was it error for the Court of Appeals, on remand from this Court in light of *McKune v. Lile*, 536 U.S. 24 (2002), to find no state compulsion, and thus no Fifth Amendment violation, when petitioners' refusal to answer the incriminating questions required to enter respondent's sexual offender treatment program causes them to serve more time in prison because completion of the program is a *de facto* requirement of parole?

## PARTIES TO THE PROCEEDING

Petitioners

Petitioners are the following convicted sex offenders housed in prisons maintained by the New Hampshire Department of Corrections at 281 N. Main Street, Concord, NH 03301, or 138 East Milan Road, Berlin, NH 03570:

a. Wayne Ainsworth
b. Kevin Badger
c. Charles Boetti
d. Francis Bowen
e. Donald Carter
f. Liston Clark, Sr.
g. Craig Coulter
h. Albert Dion
i. David Fortier
j. Joseph Giles, Sr.
k. Daniel Goodwin, Sr.
l. Allen Gould
m. Carl Graf
n. Larry Hall
o. Richard A. Hilton, Sr.
p. Duane L. Killam
q. Armand E. Lavertue
r. Kevin Lavoie
s. Walter Martin
t. David Paulsen
u. Darrel H. Rogers
v. Ronald Turgeon
w. Hershell F. Winship

**PARTIES TO THE PROCEEDING** – Continued

Respondent

Respondent Phillip Stanley is the Commissioner of the New Hampshire Department of Corrections, 105 Pleasant Street, Concord, NH, 03301.

TABLE OF CONTENTS

Page

Question Presented ..... i

Parties to the Proceeding ..... ii

Table of Contents ..... iv

Table of Authorities ..... v

Opinions Below ..... 1

Jurisdiction ..... 2

Constitutional and Statutory Provisions Involved .... 2

Statement of the Case ..... 2

Reasons for Granting the Writ ..... 8

Conclusion ..... 11

Appendix

Appendix A
Court of Appeals Opinion, 12/24/2002 ..... App. 1

Appendix B
Supreme Court Order, 6/28/2002 ..... App. 11

Appendix C
Court of Appeals Opinion, 4/3/2001 ..... App. 12

Appendix D
District Court Order, 5/18/2000 ..... App. 40

Appendix E
Magistrate's Report and Recommendation, 2/3/2000 ..... App. 52

# TABLE OF AUTHORITIES

Page

CASES

*Ainsworth v. Risley*, 244 F.3d 209 (1st Cir. 2001) ..... 1

*Ainsworth v. Stanley*, 536 U.S. ___, 122 S.Ct. 2652 (2002) (mem.) ..... 1

*Ainsworth v. Stanley*, 317 F.3d 1 (1st Cir. 2002) ..... 1

*Bordenkircher v. Hayes*, 434 U.S. 357 (1978) ..... 10

*Frisby v. Schultz*, 487 U.S. 474 (1988) ..... 8

*McGautha v. California*, 402 U.S. 183 (1971) ..... 9

*McKune v. Lile*, 536 U.S. 24 (2002) ..... 1, 7, 8, 9, 10

*Ohio Adult Parole Authority v. Woodard*, 512 U.S. 272 (1988) ..... 10

*Sandin v. Connor*, 515 U.S. 472 (1995) ..... 8

*Turner v. Safley*, 482 U.S. 78 (1987) ..... 6

OTHER AUTHORITIES

U.S. Constitution, Fifth Amendment ..... *passim*

28 U.S.C. §1254(1) ..... 2

42 U.S.C. §1983 ..... 2, 5

Supreme Court Rule 13.1 ..... 2

N.H. Revised Statutes Annotated 651:2, II(d) ..... 4

## PETITION FOR WRIT OF CERTIORARI

Petitioners Wayne Ainsworth, et al., respectfully ask this Court to issue a writ of certiorari to review the judgment and opinion of the Unites States Court of Appeals for the First Circuit.

## OPINIONS BELOW

The opinion of the Court of Appeals that gives rise to this petition is reported as *Ainsworth v. Stanley*, 317 F.3d 1 (1st Cir. 2002), reprinted in Appendix A at page App. 1, which was issued after this Court granted certiorari, vacated the Court of Appeals' prior decision, and remanded for further consideration in light of *McKune v. Lile*, 536 U.S. 24 (2002).

This Court's order is reported as *Ainsworth v. Stanley*, 536 U.S. ___, 122 S.Ct. 2652 (2002) (mem.), reprinted in Appendix B at page App. 11.

The prior Court of Appeals opinion is reported as *Ainsworth v. Risley*, 244 F.3d 209 (1st Cir. 2001), reprinted in Appendix C at page App. 12.

The underlying District Court order granting respondent's motion to dismiss and the Magistrate's report recommending that petitioners receive preliminary injunctive relief are not reported, but are reprinted in Appendix D and Appendix E, at App. 40 and App. 52, respectively.

## JURISDICTION

Petitioners invoke this court's jurisdiction to review the final judgment of the Court of Appeals pursuant to 28 U.S.C. §1254(1). The Court of Appeals issued its decision on December 24, 2002, and the clerk entered judgment that same date. This petition has been filed within 90 days of the entry of judgment. Supreme Court Rule 13.1.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

Title 42 U.S.C. §1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

## STATEMENT OF THE CASE

1. *Nature of the Suit.* Petitioners are convicted sex offenders who are in the custody of respondent Phillip

Stanley, Commissioner of the New Hampshire Department of Corrections. App. 2, 13.

Respondent offers a residential sex offender treatment program (SOP) that provides treatment, social skills training, and clinical group sessions to inmates convicted of sex crimes. App. 13. Once an inmate applies for the program, SOP staff interviews the inmate to determine if he is an appropriate candidate. As part of this screening the inmate must admit to his crime of conviction and must disclose other offending behavior for which he was neither charged nor convicted. App. 14. Questions into uncharged conduct typically stem from presentence reports and police investigations. App. 15.

Petitioners fall into one or more of three categories: those who refuse to admit their crimes of conviction because their cases are not final due to a pending direct appeal or collateral attack, those who refuse to admit their crimes of conviction because they testified at trial and are subject to a perjury charge should they recant, and those who refuse to admit to uncharged criminal conduct.[1] App. 15-16. SOP staff denies entry to all inmates who fall into any of these categories. App. 17.

Respondent does not challenge the incriminating nature of the screening questions:

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[1] For example, petitioner Carter was convicted of crimes against one minor (to which he admitted) and was suspected of crimes against a second (which he denies). He was neither charged nor convicted of any crimes against the second minor. The SOP requires Carter to admit to offenses against the second minor before admitting him into the program. App. 54.

> As the defendant concedes, the plaintiffs can easily show that the SOP's required disclosures are incriminating. To participate in the program, the plaintiffs must admit to uncharged offenses as well as the behavior that led to their crime of conviction. They receive no guarantee of immunity from prosecution – to the contrary, they are told that incriminating statements will be reported to police and prosecutors. In addition, an offender's admission to his crime of conviction could expose him to future prosecution for perjury if he denied guilt at trial, or could undermine an ongoing appeal.

App. 21-22.

Nor can it seriously be questioned that petitioners serve longer sentences as a direct result of their refusal to incriminate themselves. Specifically, petitioners' silence disqualifies them from the SOP which, in turn, costs them any chance for parole because completing the SOP is a condition precedent to parole.

New Hampshire inmates are given sentences with minimum and maximum terms, the former typically one-half of the latter, e.g., 10 to 20 years. *See* N.H. Revised Statutes Annotated 651:2, II(d). An inmate with this sentence is eligible for parole after 10 years, but will serve no more than 20 years. The New Hampshire Adult Parole Board has the authority to release an inmate at any time after serving the minimum term and conducts hearings to consider an inmate's request for such release. In the given example, the inmate can request parole at any time after serving 10 years. App. 24-25; 64-66. Absent parole, this inmate will serve 20 years in prison at which time he will "max out" and be released.

The Parole Board summarily rejects parole for those sex offenders who have not completed the SOP. "[A]n official from the New Hampshire Adult Parole Board testified that to date 97 to 98 percent of the sex offenders who received parole had completed the SOP." App. 16. Those few who gain release without completing the SOP present extraordinary circumstances. App. 31 n. 12. Indeed, respondent "does not dispute that completion of the SOP functions as a de facto requirement of parole for most New Hampshire sex offenders." App. 30.

For petitioners, gaining parole is thus conditioned upon making the self-incriminating disclosures required to enter and complete the SOP. App. 22. Failure to do so directly results in petitioners being denied parole and spending significantly more time in prison. Petitioners' refusal to incriminate themselves adds years to their time in prison, making them serve their full maximum term.

Petitioners filed this action pursuant to 42 U.S.C. §1983 seeking a declaration that the practice of requiring incriminating statements to gain entrance to the SOP is unconstitutional, and an injunction relieving petitioners from this constitutional dilemma.

2. *The District Court.* The Magistrate held an evidentiary hearing on petitioners' request for injunctive relief and recommended that the District Court grant a preliminary injunction. App. 17, 73. The Magistrate found sufficient compulsion for Fifth Amendment purposes. App. 63-68.

The District Court disagreed and granted respondent's motion to dismiss for failure to state a claim. App. 17, 51. Petitioners appealed.

3. *The Court of Appeals.* The Court of Appeals affirmed the dismissal, which it treated as a grant of summary judgment. App. 17.

The Court of Appeals began with the assumption "that the plaintiffs collectively present the strongest set of facts that support the claim they have developed – in other words, that they applied to the SOP and were rejected; that they risk future prosecution by disclosing uncharged conduct; that they have been or will be denied parole," App. 16 at n. 2, and began with the acknowledgment that petitioners "can easily show that the SOP's required disclosures are incriminating." App. 21. The question was whether respondent compelled petitioners to make those disclosures. App. 13.

The Court of Appeals' analysis centered on three of the four factors set forth in *Turner v. Safley*, 482 U.S. 78, 89-91 (1987) (the fourth being inapposite here): "whether the state's policy serves a valid governmental interest; the extent to which the prisoner is foreclosed or burdened in exercising his rights; and the presence or absence of reasonable alternatives for the government to achieve the same ends by other means without significant cost or impairment of the governmental interest at stake." App. 21 (citation omitted). Although recognizing "the closeness of the Fifth Amendment self-incrimination question presented" because petitioners "do suffer some burden in the exercise of their Fifth Amendment rights when they must chose between declining to participate in the SOP, which significantly enhances their chances for parole, or disclosing other criminal conduct," App. 36, the Court of Appeals nonetheless concluded that this burden does "not constitute a penalty sufficient to compel incriminating

speech in violation of the Fifth Amendment," App. 37, and affirmed.

4. *The Supreme Court.* Petitioners sought relief from this Court which, by order dated June 28, 2002, was granted: "Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the First Circuit for further consideration in light of *McKune v. Lile*, 536 U.S. ___, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002)." App. 11.

5. *The Court of Appeals on remand. McKune v. Lile* has three opinions. The plurality opinion rejecting Mr. Lile's Fifth Amendment claim was signed by four justices. Justice O'Connor concurred in plurality's result. The remaining four justices dissented. On remand, the Court of Appeals took a narrow reading of *McKune v. Lile.* "When no single rationale explains the result of a divided Supreme Court, we interpret the holding to be the position taken by those Members who concurred in the judgments on the narrowest grounds." App. 6 (citation, internal quotation omitted). The Court of Appeals thus turned to the concurring opinion as it provided the deciding vote. App. 6.

The Court of Appeals' review of the concurring opinion led it to the conclusion that *McKune v. Lile* offered "no clear guideposts," so the Court of Appeals "resort[ed] to [its] own sound judgment," App. 7, rejected petitioners' claim that extending their time in prison constitutes compulsion, and affirmed the District Court's order of summary judgment for respondent, App. 10.

Petitioners again seek review from this Court.

## REASONS FOR GRANTING THE WRIT

This writ should be granted "because the question presented is of substantial importance." *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). Specifically, the Court of Appeals did not follow the clear signals from this Court that extending an inmate's time in prison and crippling his chances for parole constitute sufficient compulsion for Fifth Amendment purposes.

The Court of Appeals said *McKune* provided "no clear guideposts" for resolving the issue presented. App. 7. With respect, a fair reading of all three *McKune* opinions suggests that the circumstances of this case present a Fifth Amendment violation.

A Fifth Amendment claim requires "[c]ourts [to] decide whether the consequences of an inmate's choice to remain silent are closer to the physical torture against which the Constitution clearly protects or the *de minimus* harms against which it does not." *McKune v. Lile*, 122 S.Ct. at 2028-29 (plurality opinion). To guide that decision, the plurality applied the "atypical hardship" test of *Sandin v. Connor,* 515 U.S. 472 (1995), to the facts of *McKune*:

> A prison clinical rehabilitation program, which is acknowledged to bear a rational relation to a legitimate penological objective, does not violate the privilege against self-incrimination if the adverse consequences an inmate faces for not

> participating are related to the program objectives and do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life.

*McKune v. Lile*, 122 S.Ct. at 2027 (plurality opinion).

The plurality suggested it would find a constitutional violation here:

> In the present case, respondent's decision not to participate in the Kansas SATP did not *extend his term of incarceration*. Nor did his decision *affect his eligibility for good-time credits or parole*. Respondent instead complains that if he remains silent about his past crimes, he will be transferred from the medium-security unit – where the program is conducted – to a less desirable maximum-security unit.

*McKune v. Lile*, 122 S.Ct. at 2027 (emphasis added) (plurality opinion). The most rational interpretation of this language is if an inmate's "decision not to participate" in the sex offender program *did* "extend his term of incarceration," or *did* "affect his eligibility for . . . parole," then there *is* a Fifth Amendment problem. It appears the *McKune* plurality supports petitioners' claim.

The concurring opinion expresses an intent to provide inmates with more protection, an intent to find a Fifth Amendment problem where the plurality may not:

> Although I do not think the penalties [Lile] faced were sufficiently serious to compel his testimony, I do not agree with the suggestion in the plurality opinion that these penalties could permissibly rise to the level of those in cases like *McGautha v. California*, 402 U.S. 183 (1971) (holding that statements made in the mitigation phase of a

> capital sentencing hearing may be used as evidence of guilt), *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (holding that plea bargaining does not violate the Fifth Amendment privilege against self-incrimination), and *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998) (holding that there is no right to silence at a clemency interview). *See ante* at 2028-2030. The penalties potentially faced in these cases – longer incarceration and execution – are far greater than those we have already held to constitute unconstitutional compulsion in the penalty cases.

*McKune v. Lile*, 122 S.Ct. at 2034 (O'CONNOR, J., concurring in judgment). This last sentence suggests Justice O'Connor would find compulsion here, where petitioners do face "longer incarceration" to punish their silence.

The dissenters in *McKune*, of course, would likely find a constitutional violation. First, since the dissent concluded that the transfer of Mr. Lile to a more restrictive institution was a sufficient "penalty" for purposes of the Fifth Amendment, *McKune*, 122 S.Ct. at 2040-43 (STEVENS, J., dissenting), then the dissenting justices would similarly find that more time in prison, as petitioners allege here, would constitute compulsion. And second, the dissent's conclusion that the state's interest in treating sex offenders should not outweigh a prisoner's constitutional right given the available alternatives, *McKune*, 122 S.Ct. at 2043-2044 (STEVENS, J., dissenting), it would surely strike the same balance here where there exists the same collision between the state's interest in treatment and petitioners' Fifth Amendment rights.

Petitioners suggest the Court of Appeals erred in ruling respondent does not violate petitioners' Fifth

Amendment rights by extending their time in prison for invoking silence.

## CONCLUSION

For the reasons stated above, petitioners respectfully ask that the Court grant this petition for writ of certiorari.

Respectfully submitted,

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**United States Court of Appeals**
**For the First Circuit**

No. 00-1678

WAYNE AINSWORTH, et al.,

Plaintiffs, Appellants,

v.

PHILLIP STANLEY,[1]

COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS,

Defendant, Appellee.

APPEAL FROM THE
UNITED STATES DISTRICT COURT

FOR THE DISTRICT COURT OF NEW HAMPSHIRE

[Hon. Steven J. McAuliffe, U.S. District Judge]

Before

Boudin, Chief Judge,

Torruella, and Lipez, Circuit Judges

Michael J. Sheehan, Esq. for appellants.

Andrew B. Livernois, Assistant Attorney General, with whom Philip T. McLaughlin, Attorney General of the State of New Hampshire was on brief, for appellee.

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[1] Pursuant to Rule 43(c)(2) of the Federal Rules of Appellate Procedure, we hereby substitute the current Commissioner Phillip Stanley for the late Henry Risley.

December 24, 2002

**LIPEZ, Circuit Judge**. A group of convicted sex offenders brought this action against the New Hampshire Department of Corrections ("DOC"), claiming that the DOC violated their Fifth Amendment right against self-incrimination by requiring them to disclose their histories of sexual misconduct to participate in the DOC's Sex Offenders Program ("SOP").

The district court granted the DOC's motion to dismiss in May 2000, *see Ainsworth v. Cantor,* No. Civ. 99-447-M, 2000 WL 1499495 (D.N.H. May 18, 2000). An appeal followed. In April 2001, we issued an opinion affirming the district court, *see Ainsworth v. Risley,* 244 F.3d 209 (1st Cir. 2001), and in July 2001 appellants petitioned the United States Supreme Court for a writ of certiorari. The Court did not immediately act on the petition.

In June 2002 the Supreme Court decided *McKune v. Lile,* 536 U.S. ___, 122 S. Ct. 2017 (2002), involving a similar challenge to Kansas's sex offender treatment program. By a five-to-four vote, the Court upheld the constitutionality of the Kansas program. There was, however, no majority opinion. A plurality of four justices found that the Kansas program "does not compel prisoners to incriminate themselves in violation of the Constitution." *Id.* at 2026 (plurality opinion). Justice O'Connor, writing a separate concurrence, agreed with the result reached by the plurality, but expressly disagreed with its reasoning. *See id.* at 2032-33 (O'Connor, J., concurring in the judgment). Four dissenting justices would have held the Kansas program unconstitutional. *See id.* at 2035 (Stevens, J., dissenting).

Shortly after the Supreme Court's decision in *McKune,* the Court granted the *Ainsworth* plaintiffs' petition for certiorari and summarily vacated our earlier decision, remanding the case for further consideration in light of *McKune. See Ainsworth v. Stanley,* 536 U.S. ___, 122 S. Ct. 2652 (2002) (mem.). We then gave the parties an opportunity to file supplemental briefs addressing the effect of *McKune* on our prior opinion. Now, upon due consideration of *McKune* and the parties' submissions, we once again affirm the decision of the district court.

## I.

Kansas's Sexual Abuse Treatment Program ("SATP") and New Hampshire's SOP share many attributes. For example, both programs require participants to accept responsibility for their crimes as well as divulge their sexual histories and any other sexual offenses they may have committed. In addition, neither program offers immunity from prosecution for any statements made in connection with the program. Compare *McKune,* 122 S. Ct. at 2022-25 (describing Kansas program), with *Ainsworth,* 244 F.3d at 210-212 (describing New Hampshire program). The two states' programs, however, differ in a number of respects. For example, in *McKune* the plaintiffs were ordered to participate in the program, *see McKune,* 122 S. Ct. at 2023, whereas in New Hampshire, the program is voluntary,[2] *see Ainsworth,* 244 F.3d at 211. More

[2] As we noted before, the *Ainsworth* appellants' brief asserted that "some of the plaintiffs apply for the SOP 'because their sentence specifically requires completion'. . . . However, the plaintiffs in no way develop this argument in their brief, precluding our consideration of the

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importantly, the programs differ with respect to the consequences for nonparticipation. In Kansas, nonparticipation results in the automatic curtailment of several privileges (including visitation rights, earnings, work opportunities, ability to send money to family, canteen expenditures, and access to a personal television), as well as an automatic transfer to less desirable housing. *See McKune,* 122 S. Ct. at 2023. In New Hampshire, nonparticipation can similarly result in a transfer to less desirable housing. More significantly, however, nonparticipation in the SOP almost always results in an inmate being denied parole. *See Ainsworth,* 244 F.3d at 212 ("At the preliminary injunction hearing, an official from the New Hampshire Adult Parole Board testified that to date 97 to 98 percent of the sex offenders who received parole had completed the SOP.").

The plurality opinion in *McKune* concluded that Kansas's SATP and the consequences for nonparticipation in it did not combine to create a compulsion that impermissibly encumbers the constitutional right not to incriminate oneself. In coming to this conclusion, the plurality relied on *Sandin v. Conner,* 515 U.S. 472 (1995), a due process challenge to prison conditions. While acknowledging that a due process claim differs from a Fifth Amendment claim, the plurality looked to *Sandin* in evaluating the latter. *McKune,* 122 S. Ct. at 2026 (plurality opinion). The Court in *Sandin* held that adverse prison conditions cannot give rise to a due process violation unless they constitute "atypical and significant hardship

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implications of any such sentencing requirements." *Ainsworth,* 244 F.3d at 216 n. 9.

[s] on [inmates] in relation to the ordinary incidents of prison life." *Sandin,* 515 U.S. at 484. Relying on this "useful instruction," the plurality concluded that the penalties imposed on the *McKune* plaintiff were significantly less than the potential penalties inmates faced in selected other cases in which the Supreme Court had determined that there was no Fifth Amendment violation. *McKune,* 122 S. Ct. at 2027-29 (plurality opinion). Therefore, according to the plurality, the SATP was not constitutionally impermissible.

In concurring in the judgment on much narrower grounds, Justice O'Connor rejected the idea that *Sandin*'s due process analysis should be imported into a Fifth Amendment compulsion analysis. Indeed, she indicated that she "agree[d] with Justice STEVENS [in dissent] that the Fifth Amendment compulsion standard is broader than [the *Sandin* test]." *McKune,* 122 S. Ct. at 2032 (O'Connor, J., concurring in the judgment). On the facts of *McKune,* however, Justice O'Connor did not believe that "the penalties assessed against respondent in response to his failure to incriminate himself [were] compulsive on any reasonable test." *Id.* at 2035 (emphasis added). Curtailment of certain privileges and a transfer to less hospitable housing were simply not consequences "serious enough to compel [plaintiff] to be a witness against himself," *id.* at 2033-34, regardless of the theory used to evaluate the claim. Thus, without subscribing to the plurality's reasoning, Justice O'Connor concurred in the plurality's judgment. *Id.* at 2035.

## II.

When no single rationale explains the result of a divided Supreme Court, we interpret the holding to be the "position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States,* 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia,* 428 U.S. 153, 169 (1976)). Hence the Tenth Circuit held on remand in *McKune* that the inmates' claims "[did] not rise to the level of compulsion contemplated by Justice O'Connor's concurring opinion" and dismissed them on that ground. *Lile v. McKune,* 299 F.3d 1229, 1230 (10th Cir. 2002). *See also Searcy v. Simmons,* 299 F.3d 1220, 1225 (10th Cir. 2002) ("[W]e view [Justice O'Connor's] concurrence as the holding of the Court in *McKune.*"); *Reed v. McKune,* 298 F.3d 946, 952 (10th Cir. 2002) ("Justice O'Connor's narrower position in her concurrence represents the holding of the plurality decision."). We agree with this approach. Justice O'Connor's concurrence is "arguably more narrow than the plurality's and therefore constitutes the holding of the Court." *Lurie v. Wittner,* 228 F.3d 113, 130 (2d Cir. 2000); *see also Fernandes v. Costa Bros. Masonry, Inc.,* 199 F.3d 572, 580 (1st Cir. 1999) ("[I]nferior courts should give effect to the narrowest ground upon which a majority of the Justices supporting the judgment would agree.").

The difficulty presented by this interpretive precept is that Justice O'Connor does not purport to lay out any abstract analysis or unifying theory that would prefigure her views regarding the constitutionality of New Hampshire's program.[3] Taken together, the O'Connor and

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[3] Since both the plurality and Justice O'Connor reject the argument that a transfer to less desirable housing is constitutionally

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plurality opinions do not clearly foreshadow how the court would decide our case. For example, the plurality opinion notes in passing that nonparticipation in the Kansas program "[does] not extend [the] term of incarceration," nor does it "affect [ ] eligibility for good-time credits or parole." *McKune,* 122 S. Ct. at 2027 (plurality opinion). Later in the opinion, however, the plurality notes that in *Minnesota v. Murphy,* 465 U.S. 420 (1984), the Court found no compulsion to speak when "the defendant feared the possibility of additional jail time as a result of his decision to remain silent." *McKune,* 122 S. Ct. at 2029 (plurality opinion). Thus, while the plurality apparently felt it noteworthy that a loss of parole was not at stake in Kansas, whereas it is in this case, it is far from clear that the plurality would regard such a consequence as constitutionally impermissible. Under these circumstances, in considering our earlier opinion in light of *McKune* as the remand requires, we have no clear guideposts. Instead, we must resort to our own sound judgment, so long as it does not conflict with existing precedent.

## III.

Our prior decision in this case examined a long line of Supreme Court precedents in which compulsion under the Fifth Amendment was at issue. We recognized that historically the Supreme Court had described compulsion in relatively broad terms. However, we also noted that in more recent decisions the Court had held that the analysis is more circumscribed in the prison context. Citing the

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impermissible, appellants have withdrawn their "punitive housing transfer" claim. *See* Appellants' Suppl. Br. at 5.

"watershed case" of *Turner v. Safley,* 482 U.S. 78 (1987), we reaffirmed our prior observation that when "burdens are laid upon the exercise of constitutional rights by prisons, the Supreme Court's current approach is to give very substantial latitude to the state's judgment." *Ainsworth,* 244 F.3d at 213 (quoting *Beauchamp v. Murphy,* 37 F.3d 700, 704 (1st Cir. 1994), *cert. denied,* 514 U.S. 1019 (1995)). Only "unreasonable" burdens are proscribed. In determining whether a burden is unreasonable, we will look to:

> whether the state's policy serves a valid governmental interest; the extent to which the prisoner is foreclosed or burdened in exercising his rights; and the presence or absence of reasonable alternatives for the government to achieve the same ends by other means without significant cost or impairment of the governmental interest at stake.

*Id.* at 214 (quoting *Beauchamp,* 37 F.3d at 705 (citing *Turner,* 482 U.S. at 89-91) (internal quotations omitted)).

Without recapitulating our prior decision in its entirety, suffice it to say that we determined that the burden placed on appellants is not an unreasonable one. We began by citing criminological studies and social science research, noting that the admission of crimes is "widely believed to be a necessary prerequisite for successful treatment" of sex offenders. We determined that "New Hampshire unmistakably has a valid government interest in establishing the SOP, and in requiring sex offenders to admit past conduct to participate in it." *Id.* at 215.

Next, we examined the extent of the burden. We began by noting that "inmates do not have a 'liberty right'

to parole" under either federal or New Hampshire law. *Id.* at 216. We recognized that there was some burden placed on appellants' exercise of their Fifth Amendment rights, but that the extent of that burden was mitigated by three factors. First, appellants were not suffering a new or additional penalty by being denied parole. Since parole involves relief from a penalty that has already been imposed – the full period of incarceration to which appellants were sentenced – parole can be considered a "benefit that the state may condition on completion of the program." *Id.* at 216. Given the "crucial distinction between being deprived of a liberty one has . . . and being denied a conditional liberty that one desires," *Greenholtz v. Inmates of Neb. Penal & Corr. Complex,* 442 U.S. 1, 9 (1979), we concluded that this aspect of the burden mitigated its extent. Second, we noted that the extent of the burden was also mitigated by the voluntary nature of the program (notwithstanding the consequences of nonparticipation). Third, we observed that the denial of parole was not entirely automatic. While the vast majority of parolees had completed the SOP prior to release, a few inmates are paroled each year despite having not completed the SOP.

Finally, we considered "whether reasonable alternatives exist for the government to achieve its ends without significant cost or impairment to the governmental interest at stake." *Ainsworth,* 244 F.3d at 220. We recognized that the state could offer a grant of limited-use immunity to appellants before requiring them to disclose past misconduct. Any impermissible Fifth Amendment compulsion would thus be obviated. However, we concluded that "the decision about whether to grant immunity to sex offenders is a policy choice that lies in the state's hands." *Id.* at 221.

Our ultimate conclusion under the *Turner* framework, in light of the three factors outlined above, was as follows:

> Weighing these factors, and drawing upon the meaning of compulsion under the Fifth Amendment developed by the precedents we have cited, we conclude that the reduced likelihood of parole for refusing to participate in the SOP does not constitute a penalty sufficient to compel incriminating speech in violation of the Fifth Amendment.

*Ainsworth*, 244 F.3d at 221. Having duly considered our decision in light of *McKune*, we now adhere to our earlier judgment. The judgment of the district court is **affirmed.**

**SO ORDERED.**

153 L.Ed.2d 829, 70 USLW 3317, 70 USLW 3792, 70 USLW 3797, 2002 Daily Journal D.A.R. 7356.

Supreme Court of the United States

Wayne AINSWORTH, et al., petitioners,

v.

Phil STANLEY, Commissioner, New Hampshire Department of Corrections.

No. 01-648.

June 28, 2002.

Case below, 244 F.3d 209.

On petition for writ of certiorari to the United States Court of Appeals for the First Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the First Circuit for further consideration in light of *McKune v. Lile*, 536 U.S. ___, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002).

**United States Court of Appeals**

**For the First Circuit.**

No. 00-1678

WAYNE AINSWORTH, et al.,

Plaintiffs, Appellants,

v.

HENRY RISLEY, COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Steven J. McAuliffe, U.S. District Judge]

Before

Torruella, *Chief Judge,*

Boudin, and Lipez, *Circuit Judges.*

*Michael J. Sheehan* for appellants.

*Andrew B. Livernois*, Attorney, New Hampshire Civil Bureau, with whom *Philip T. McLaughlin*, Attorney General, New Hampshire was on brief, for appellee.

April 3, 2001

**LIPEZ, *Circuit Judge*.** A group of convicted sex offenders claim, pursuant to 42 U.S.C. § 1983, that the New Hampshire Department of Corrections violated their Fifth Amendment right against self-incrimination by requiring them to disclose their histories of sexual misconduct to participate in a sex offender treatment program. The plaintiffs argue that the required disclosures

are incriminating because they could lead to future prosecutions or perjury charges, or could affect ongoing appeals. They argue that the disclosures are compelled because completion of the treatment program is a de facto requirement for parole and for maintaining residence in desired prison housing. The district court granted the defendant's motion to dismiss, finding that the plaintiffs failed to state a cognizable Fifth Amendment claim. We affirm.

## I.

The facts in this case generally are not disputed. The plaintiffs are 23 inmates in the New Hampshire State Prison who have been convicted of sex offenses. As sex offenders, they may apply for the prison's Sexual Offender Program (SOP), instituted in 1986. According to its mission statement, the SOP seeks to "ensure community safety and protection" by preventing recidivism. The program is designed to "address sexual addiction," "help offenders understand the thoughts, feelings and behaviors which precede their offense," and "develop relapse prevention skills." To that end, the SOP provides residential therapy to 60 inmates a year.[1] Participants live together in a dorm and receive 10 to 15 hours of treatment a week for 12 to 16 months. Treatment includes community meetings, social skills training groups, clinical groups, and a yearlong structured workbook series.

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[1] At the time relevant to this litigation, there were about 650 sex offenders in the New Hampshire State Prison.

Inmates must apply to the SOP to be admitted. Applicants are placed on a waiting list. Within two years of the earliest date on which an applicant could receive parole, two SOP staff members assess his eligibility for the program. Selection criteria include an applicant's willingness to admit his offense and accept responsibility for it. "If an applicant appears open and honest, recognizes he has a serious problem and is committed to changing his behavior, he is approved for programming." The program bases these requirements on the belief that sex offenders must recognize past misconduct before effective treatment can begin.

Inmates who are accepted by the SOP must sign a "treatment contract." Provisions of the contract include: "I agree to be complete [sic] open and honest and assume full responsibility for my offenses and my behavior;" and "I understand that I have committed a sexual crime and I will be required to discuss and complete assignments regarding my sexual history/deviancy. I may be required to answer many questions about my sexual past and my current sexual behavior." Inmates also agree to release any information about past behavior sought by program staff, and, if necessary, to take a lie detector test "to ensure full disclosure of offending history." Finally, SOP participants must sign a waiver of confidentiality. The waiver states, in relevant part:

> I have been informed that any staff member at N.H. State Prison is required by law to report to the appropriate authorities, including but not limited to, the County Attorney's Office, the State Police, Local Police, Division for Children and Youth Services and Probation Department, any actual or suspected sexual offense of a specifically identifiable victim, regardless of how the

> staff member gains knowledge of such occurrence or potential occurrence. The SOP rejects inmates who refuse to comply with the terms of the treatment contract or to sign a confidentiality waiver. The program also generally deems inmates whose cases are on appeal unsuitable for treatment because they have not acknowledged responsibility for their crime of conviction.

Lance Messinger, director of the SOP, testified about the disclosure requirements at a hearing on the plaintiffs' petition for injunctive relief. Messinger said that SOP staff members do not require applicants to identify other victims whose names have not already been reported, and that they discourage them from providing specific information that could be incriminating. However, Messinger said that if staff members already have information about an offense with which the applicant has not been charged, they press the applicant to admit to that offense. Such information usually comes from an inmate's presentence report and may concern allegations about an additional victim. Any admissions of uncharged conduct that an inmate makes must be reported to police and prosecutors. Messinger said that he has tried on a case-by-case basis to win immunity from prosecution for specific SOP participants, with limited success. Messinger said that he remembered one case within the last ten years in which the county attorney prosecuted a case based on admissions made through the SOP.

The individual plaintiffs in this case have had a variety of experiences with the SOP. Some of the plaintiffs have not applied for the SOP because of the required disclosures. Others have applied and were rejected because they refused to admit to their crime of conviction, because their case was on appeal, or because they refused

to admit to an uncharged offense involving an additional victim.[2]

A few of the plaintiffs must complete the SOP as a condition of their sentence. The majority, however, applied for the program for two reasons. First, completion of the SOP is generally, though not always, required before sex offenders receive parole. At the preliminary injunction hearing, an official from the New Hampshire Adult Parole Board testified that to date 97 to 98 percent of the sex offenders who received parole had completed the SOP. Second, sex offenders who do not complete the SOP often are transferred from South Unit to Hancock Building. Both South and Hancock are medium security units, but the plaintiffs view South as preferable housing. South has two-man cells, 24-man pods, extensive outdoor privileges, and houses mainly sex offenders. Hancock has eight-man cells, 96-man pods, only one hour of outdoor access, and houses mainly drug and violent offenders. The plaintiffs testified that South is a safer unit for sex offenders, and some of them said they had been assaulted or hassled at Hancock. They also point out that transfers to Hancock are used to punish South inmates who commit minor disciplinary offenses.

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[2] For the purposes of our analysis, we assume that the plaintiffs collectively present the strongest set of facts that support the claim they have developed – in other words, that they applied to the SOP and were rejected; that they risk future prosecution by disclosing uncharged conduct; that they have been or will be denied parole; and that they have been or will be transferred to a less desirable cellblock in the prison.

The plaintiffs filed this action as a petition for declaratory and injunctive relief. A magistrate judge held a hearing on the petition and recommended that the court grant a preliminary injunction enjoining the defendant from making admission of uncharged criminal conduct a condition of participation in the SOP, unless the plaintiffs received immunity from use of their admissions in future prosecutions. The district court rejected the magistrate judge's recommendation and granted the defendant's motion to dismiss for failure to state a claim, finding that the plaintiffs had failed to establish that the prison's policies violated the Fifth Amendment privilege against self-incrimination.

Normally, a motion to dismiss for failure to state a claim is based only on the pleadings. *See* Fed R. Civ. Proc. 12(b)(6). In this case, the district court had before it evidence developed at the preliminary injunction hearing. *See Developmental Disabilities Advocacy Center, Inc. v. Melton,* 689 F.2d 281, 282 (1st Cir. 1989). Both the court and the parties repeatedly referred to this evidence, effectively converting the motion to dismiss to a motion for summary judgment. Fed. R. Civ. Proc. 12(b)(6) ("If, on a motion . . . to dismiss for failure . . . to state a claim . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment."). We thus review the district court's decision according to summary judgment standards, considering the facts and all reasonable inferences to be drawn from them in the light most favorable to the nonmoving party. *See F.D.I.C. v. Kooyomjian,* 220 F.3d 10, 13-14 (1st Cir. 2000). The moving party prevails if there is no genuine dispute as to any material fact and the party is entitled to judgment as a matter of law. *See* Fed. R. Civ.

Proc. 56(c). Our review is de novo. *See Garside v. Osco Drug, Inc.*, 895 F.2d 46, 48 (1st Cir. 1990).

## II.

The Fifth Amendment prevents any person from being "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Amendment's self-incrimination clause applies to the states through the Fourteenth Amendment. *See Spevack v. Klein*, 385 U.S. 511, 514 (1967). The protection against self-incrimination extends beyond criminal investigations, privileging a witness "not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). A criminal defendant who has been convicted retains the privilege after imprisonment as long as his testimony may be used against him in a future trial for a crime of which he has not yet been convicted. *See Mitchell v. United States*, 526 U.S. 314, 325 (1999); *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984). Two criteria must be met in order for the privilege to apply: the witness must reasonably believe that his statements may be used to incriminate him, *Hoffman v. United States*, 341 U.S. 479, 486 (1951), and the statements must be compelled. *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977) ("the touchstone of the Fifth Amendment is compulsion"). Compulsion exists when some factor denies the individual the "free choice to admit, to deny, or to refuse to answer." *Lisenba v. California*, 314 U.S. 219, 241 (1941).

The Supreme Court has found testimony to be compelled in several contexts. For example, the Court has

found that the state impermissibly compelled testimony by forcing police officers and city employees to choose between incriminating themselves and losing their jobs. *See Garrity v. New Jersey,* 385 U.S. 493 (1967); *Gardner v. Broderick,* 392 U.S. 273, 274 (1968); *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of New York,* 392 U.S. 280 (1968). The Court also has found that the statements of an attorney made at a disciplinary proceeding under threat of disbarment were compelled, *see Spevack,* 385 U.S. at 516. And it has invalidated state statutes that stripped an attorney of his state political party office and architects of a city-awarded contract because they refused to waive their Fifth Amendment privilege. *See Cunningham,* 431 U.S. at 808; *Turley,* 414 U.S. at 85.

In these early cases, the consequences of refusing to give potentially incriminating testimony were economic. Yet the Court described compulsion in relatively broad terms. In *Spevack,* the Court said that a "'penalty' is not restricted to fine or imprisonment" but instead means "the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.'" *Spevack,* 385 U.S. at 515 (citing *Griffin v. California,* 380 U.S. 609, 614 (1965)). In *Cunningham,* the Court said that the Fifth Amendment protects against state-imposed "potent sanctions" or "substantial penalties." *Cunningham,* 431 U.S. at 805. The Court also "rejected the notion that citizens may be forced to incriminate themselves because it serves a governmental need," saying that the interests of the state, even if compelling, do not "justify infringement of Fifth Amendment rights." *Id.* at 808.

Later Supreme Court cases, however, have qualified the application of these broad, rights-protective statements in cases involving prisoners, holding that courts

must consider the state's interest in imposing a rule or requirement related to imprisonment when deciding whether that requirement violates an inmate's constitutional rights. The watershed case is *Turner v. Safley,* 482 U.S. 78 (1987), in which the Court said that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89. As we have said before in assessing the impact of *Turner,* "[w]here burdens are laid upon the exercise of constitutional rights by prisoners, the Supreme Court's current approach is to give very substantial latitude to the state's judgment." *Beauchamp v. Murphy,* 37 F.3d 700, 704 (1st Cir. 1994), *cert. denied,* 514 U.S. 1019 (1995).[3]

As was the case in *Beauchamp, Turner* differs from the case at hand because it involved "the actual running of prisons and the most practical considerations of discipline, security, administrative feasibility and cost." *Id.* The state offers treatment to sex offenders out of concern about prisoners' post-release conduct – most pressingly, in hopes that such treatment will reduce recidivism rates by

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[3] The Supreme Court has used *Turner*'s reasonableness test, for example, in rejecting prisoners' First Amendment claims. *See, e.g., O'Lone v. Estate of Shabazz,* 482 U.S. 342 (1987) (prison officials acted reasonably by precluding Islamic inmates from attending weekly Friday religious service and thus did not violate the First Amendment); *Thornburgh v. Abbott,* 490 U.S. 401 (1989) (reasonable and so constitutional to regulate prisoners' mail). And the Court has been similarly deferential to the state's interests in Fifth Amendment due process cases, holding that prisoners' liberty interests extend only to freedom from restraint that "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner,* 515 U.S. 472, 472 (1995).

helping to rehabilitate SOP participants – rather than out of concern about effective prison management. Still, the state's interest remains relevant to determining whether the SOP's required admissions violate the plaintiffs' Fifth Amendment rights. "The limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives – including deterrence of crime, rehabilitation of prisoners, and institutional security." *O'Lone v. Shabazz,* 482 U.S. 342, 348 (1987). In light of *Turner,* the burden that a prison rule or requirement places on an inmate's constitutional rights cannot be unreasonable, and reasonableness largely turns upon the facts. With some emphases peculiar to prison regulation, *Turner* itself identifies pertinent criteria: whether the state's policy serves a valid governmental interest; the extent to which the prisoner is foreclosed or burdened in exercising his rights; and the presence or absence of reasonable alternatives for the government to achieve the same ends by other means without significant cost or impairment of the governmental interest at stake. *Beauchamp,* 37 F.3d at 705 (citing *Turner,* 482 U.S. at 89-91).[4]

As the defendant concedes, the plaintiffs can easily show that the SOP's required disclosures are incriminating. To participate in the program, the plaintiffs must admit to uncharged offenses as well as the behavior that led to their crime of conviction. They receive no guarantee

[4] We set aside a fourth consideration in *Turner,* the effect of the remedy sought on the prison and other inmates, because it is "linked peculiarly to prison operations." *Beauchamp,* 37 F.3d at 705 n.1.

of immunity from prosecution – to the contrary, they are told that incriminating statements will be reported to police and prosecutors. In addition, an offender's admission to his crime of conviction could expose him to future prosecution for perjury if he denied guilt at trial, or could undermine an ongoing appeal. *See Lile v. McKune,* 224 F.3d 1175, 1180 (10th Cir. 2000) *petition for cert. filed,* 69 U.S.L.W. 3506 (U.S. Jan. 22, 2001) (No. 00-1187).

Thus the real question before us is whether the disclosures required by the SOP are unconstitutionally compelled within the meaning of the Fifth Amendment. The plaintiffs offer two sets of facts to show that the consequence of their refusal to make the admissions required by the SOP is a penalty sufficient to constitute compulsion. First, the plaintiffs claim that because the parole board has denied or will deny them parole until they complete the SOP, they have no choice but to comply with the program's requirements. Second, they argue that failure to complete the SOP has led or will lead to a "punitive transfer" from South Unit to Hancock Building, and that this transfer is sufficient punishment to compel their admissions. With particular attention to the burden element, we apply *Turner*'s three-part test to determine whether the denial of parole or the prison housing transfer are penalties sufficient to compel speech within the prohibition of the Fifth Amendment. *See Lile,* 224 F.3d at 1190 (applying *Turner* to prisoners' Fifth Amendment claims).

## A. Denial of Parole

### 1. Valid Government Interest

New Hampshire law gives the parole broad discretion over release decisions, directing the board to base its

judgment on whether there is a "probability that the inmate will remain at liberty without violating any law and will conduct himself as a good citizen." N.H. Code of Admin. Rules. Ann. § 301.01. Whether a sex offender has completed the SOP is one factor that the New Hampshire parole board may consider in deciding whether a sex offender merits early release. *See* N.H. Code of Admin. R. Ann. § 301.02(h) (parole board may take into account evidence of "self-improvement" achieved through prison programs, "specifically programs which addressed problems or issues that contributed to the inmate's prior criminal conduct"). The question under *Turner* is whether this consideration is based on a valid governmental interest.

Unquestionably, the state has an acute interest in seeking to rehabilitate sex offenders in hopes of deterring future crime, particularly given the large body of research showing that sex offenders commit repeat crimes at alarming rates.[5] To that end, New Hampshire established the SOP. The program's requirement that participants admit to their crimes is widely believed to be a necessary prerequisite to successful treatment.[6] While some research

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[5] *See* Katie Isaac, *Kansas v. Hendricks: A Perilous Step Forward in the Fight Against Child Molestation*, 35 Hous. L. Rev. 1295, 1296 (1998) (citing a 1993 study that found that "forty-two percent of imprisoned child molesters are later reconvicted for violent or sexual crimes").

[6] *See* Brendan J. Shevlin, *"[B]etween the Devil and the Deep Blue Sea:" A Look at the Fifth Amendment Implications of Probation Programs for Sex Offenders Requiring Mandatory Admissions of Guilt*, 88 Ky. L.J. 485, 485 (2000); Jonathan Kaden, *Therapy for Convicted Sex Offenders: Pursuing Rehabilitation Without Incrimination*, 89 J. Crim. L. & Criminology 347, 365 n.103 (1998); Scott Michael Solkoff, *Judicial*

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stresses the difficulty of drawing conclusions about the success rates of sex offender treatment,[7] other studies show that treated sex offenders are less likely to commit new crimes.[8] Indeed, the SOP may be achieving some success. Director Lance Messinger testified that twelve percent of untreated offenders released from the prison since 1980 returned on a new sex-offense conviction, while only six percent of those who completed the SOP did. New Hampshire unmistakably has a valid government interest in establishing the SOP, and in requiring sex offenders to admit past conduct to participate in it.

### 2. Burden on the Exercise of Plaintiffs' Rights

The plaintiffs argue that the denial of parole is a penalty because it forces them to serve a longer prison term than they otherwise would. For example, an inmate with an indeterminate sentence of seven to fifteen years who has no disciplinary infractions would become eligible

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*Use Immunity and the Privilege Against Self-Incrimination in Court Mandated Therapy Programs,* 17 Nova L. Rev. 1441, 1450 (1993).

[7] *See* David DePugh, *The Right to Treatment for Involuntarily Committed Sex Offenders in the Wake of Kansas v. Hendricks,* 17 Buff. Pub. Int. L.J. 71 n.140 (1999); Jessica Wilen Berg, *Give Me Liberty or Give Me Silence: Taking a Stand on Fifth Amendment Implications for Court-Ordered Therapy Programs,* 79 Cornell L. Rev. 700, 700 n.2 (1994).

[8] *See* Kaden, *supra* note 6, at 365 n.103 (citing one study in which 60 percent of untreated offenders committed another crime, and another in which only eight of 100 treated offenders did so); Solkoff, *supra* note 6, at 1450 (citing study in which the four-year recidivism rate decreased from 60 percent for untreated offenders to 25 percent for treated offenders).

for parole after serving seven years, but would most likely serve his full sentence if he does not complete the SOP. The defendant counters that parole is not a right but a privilege. He points out that inmates do not have a "liberty right" to parole under the Due Process Clause of the Fifth Amendment, *see Greenholtz v. Inmates of Nebraska Penal and Correctional Complex,* 442 U.S. 1, 7 (1979), or under New Hampshire law, *see* N.H. Rev. Stat. Ann. § 651-A:6(I) (providing that a "prisoner *may* be released on parole upon the expiration of the minimum term of his sentence") (emphasis added); *Knowles v. Warden, New Hampshire State Prison,* 666 A.2d 972, 975 (N.H. 1995); *Baker v. Cunningham,* 513 A.2d 956, 960 (N.H. 1986).

The lack of a liberty interest in parole, however, does not settle the question of whether the denial of parole can constitute a penalty for the purpose of Fifth Amendment compulsion. From *Garrity* to the recent case *Ohio Adult Parole Authority v. Woodard,* the Supreme Court has evaluated Fifth Amendment self-incrimination claims without reference to a liberty interest analysis. *See, e.g., Garrity,* 385 U.S. at 496-501; *Woodard,* 523 U.S. 272, 285-88 (1998); *compare Lile,* 224 F.3d at 1183.

The SOP's requirement that offenders disclose uncharged conduct, at the risk that their admissions will be reported to police and prosecutors, presents the plaintiffs with a difficult dilemma. This dilemma undoubtedly imposes some burden on the exercise of their Fifth Amendment rights. The extent of the burden is mitigated, however, by three factors: the kind of burden the plaintiffs face, the voluntary nature of their choice about whether to

participate in the SOP, and the fact that the denial of parole does not follow automatically from the refusal to speak.[9]

First, parole involves relief from a penalty that has already been imposed – the full period of incarceration to which the plaintiffs were sentenced. There is no new or additional penalty for refusing to participate in the SOP. To the extent that such labels are useful, the SOP is a benefit that New Hampshire makes available to sex offenders, and parole is a further benefit that the state may condition on completion of the program. *See Greenholtz,* 442 U.S. at 11 ("That the state holds out the possibility of parole provides no more than a mere hope that the benefit will be obtained.").[10]

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[9] The plaintiffs' brief asserts that some of the plaintiffs apply for the SOP "because their sentence specifically requires completion." These plaintiffs may have a stronger claim of Fifth Amendment compulsion. However, the plaintiffs in no way develop this argument in their brief, precluding our consideration of the implications of any such sentencing requirements.

[10] The plaintiffs unsuccessfully look for support to *Neal v. Shimoda,* 131 F.3d 818 (9th Cir. 1997). In *Neal,* the Ninth Circuit held that a prison regulation that labeled inmates as sex offenders and required completion of a sex offender treatment program as a condition for parole eligibility created a liberty interest and some due process protection for prisoners who had not been convicted of sexual misconduct. *See id.* at 830. Since *Neal* found that an inmate's due process rather than Fifth Amendment self-incrimination rights were violated by the prison regulation at issue, it is not contrary to our holding here. Moreover, the Ninth Circuit emphasized the automatic nature of the denial of parole in finding a liberty interest to be at stake. *See id.* at 829 ("[B]ecause the State's regulations render the inmate *completely ineligible* for parole if the treatment program is not satisfactorily completed, the attachment of the 'sex offender' label to the targeted

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Because the plaintiffs have not yet obtained release, the nature of the penalty they face differs from the one at issue in *Minnesota v. Murphy,* 465 U.S. 420 (1984). Murphy was required to attend a treatment program for sex offenders as a condition of his probation. When his probation officer questioned him about admissions Murphy made during the course of treatment regarding an uncharged rape and murder, he confessed to those crimes. *See id.* at 424. His statements were then used to prosecute him. Murphy argued that his statements were compelled because his probation would have been revoked had he refused to answer. *See id.* at 434. The court agreed that the state could not directly link invocation of the Fifth Amendment privilege to revocation of probation, stating:

> There is thus a substantial basis in our cases for concluding that if the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation . . . and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.

*Id.* at 435. The Court held, however, that Murphy's confessions were not compelled because there was "no suggestion that his probation was conditional on his waiving his Fifth Amendment privilege." *Id.* at 437.[11]

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inmate has a practical and inevitable coercive effect on the inmate's conduct.") (emphasis in original).

[11] Of course, the quoted statement in *Murphy* is 17-year-old dictum, and we do not know how the present Supreme Court would view

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While both *Murphy* and the case at hand involve the issue of prosecution based on criminal admissions made during a sex offender treatment program, Murphy's "classic penalty" scenario does not apply here. A probationer or parolee has already achieved liberty, and thus has an expectation of retaining it. An inmate who has not been granted parole has no such expectation. *See Greenholtz,* 442 U.S. at 9 ("There is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires."). Moreover, the parole board has already weighed the safety risk posed by the probationer or parolee and decided that he or she is fit to rejoin the community. Before release, an inmate has not passed this threshold test. In *Greenholtz,* the Court viewed these differences as support for its holding that inmates do not have a constitutional due process right to parole, in contrast to already released offenders, who do have due process rights when the state seeks to revoke their parole or probation. *See id.* at 9. Similarly, a treatment program that conditioned participation on incriminating admissions might violate the Fifth Amendment if that program was in turn a condition of probation or of maintaining parole, but a program that conditioned participation on incriminating admissions as a condition of obtaining release on parole does not. The case law recognizes this distinction. Following *Murphy,* some courts have found Fifth Amendment violations where sex offenders were required to disclose past misconduct for treatment

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disclosure obligations imposed on parolees. *Compare Asherman v. Meachum,* 957 F.2d 978 (2d Cir. 1992).

programs that were a condition of probation or a court-suspended sentence. *See Mace v. Amestoy,* 765 F.Supp. 847, 850 (D. Vt. 1991); *State v. Fuller,* 915 P.2d 809, 814 (Mont. 1996); *State v. Imlay,* 813 P.2d 979, 985 (Mont. 1991); *State v. Kaquatosh,* 600 N.W.2d 153, 158 (Minn. Ct. App. 1999); *cf. United States v. Davis,* 2001 WL 224550 *2 (1st Cir. 2001) (probationer free to challenge revocation of supervised release as a penalty for exercise of Fifth Amendment privilege should revocation occur); *but see Asherman v. Meachum,* 957 F.2d 978 (2d Cir. 1992) (en banc). But courts have denied claims where treatment programs were a condition of initial parole eligibility. *See Doe v. Sauer,* 186 F.3d 903 (8th Cir. 1999); *Russell v. Eaves,* 722 F. Supp. 558 (E.D. Mo. 1989).

The second factor that mitigates the burden imposed by the SOP's disclosure requirement is the relatively voluntary nature of the plaintiffs' decision about whether to participate in the program. The relevant precedent is *Ohio Adult Parole Authority v. Woodard,* 523 U.S. 272 (1998). Woodard, who had been sentenced to death, said that Ohio's clemency process violated his Fifth Amendment rights by forcing him to answer questions at his one guaranteed clemency interview, or, if he remained silent, permitting his silence to be used against him. He argued that the "interview unconstitutionally condition[ed] his assertion of the right to pursue clemency on his waiver of the right to remain silent." *Id.* at 285-86.

The Court rejected this argument on the ground that Woodard was not required to attend or speak at his clemency hearing. The Court said: "It is difficult to see how a voluntary interview could 'compel' respondent to speak. He merely faces a choice quite similar to the sorts of choices that a criminal defendant must make in the course of

criminal proceedings, none of which has ever been held to violate the Fifth Amendment." *Id.* at 287. The Court recognized that Woodard faced a choice between "providing information to the [Parole] Authority – at the risk of damaging his case for clemency or for postconviction relief – or of remaining silent." *Id.* at 287-88. But that choice, despite its consequences, did not support a claim within the meaning of the Fifth Amendment's self-incrimination clause. The Court said that the "pressure to speak in the hope of improving [respondent's] chance of being granted clemency does not make the interview compelled." *Id.* at 288.

Whether the choice that the plaintiffs here face is voluntary in a meaningful sense seems to us a closer question. By making the admissions required by the SOP, the plaintiffs risk not only damaging their cases on appeal, but also exposing themselves to future prosecution. If the plaintiffs refuse to speak, they face the strong possibility of serving more years in prison than they otherwise would. Still, like Woodard, the plaintiffs have a choice about participating in the SOP, despite the consequences that follow from that choice. The plaintiffs' choice about whether to disclose past misconduct is voluntary as *Woodard* understands the term.

The third factor we consider is whether the denial of parole follows automatically from the plaintiffs' refusal to speak. Some of the plaintiffs testified that prison officials told them that they would not be granted parole unless and until they completed the SOP, and the defendant does not dispute that completion of the SOP functions as a de facto requirement of parole for most New Hampshire sex offenders. At the same time, the defendant has shown that a few inmates who have not completed the SOP receive

parole each year under special circumstances.[12] These unusual grants of release are possible because New Hampshire's parole statute nowhere states that the board must reject a parole applicant because he has not completed the SOP. As we have noted, New Hampshire's parole statute gives the parole board broad discretion to decide whether an inmate is likely to obey the law and observe the terms of his release. *See Baker,* 513 A.2d at 960.

The distinction between a highly probable de facto requirement and a statutorily mandated one has legal significance. In the early Supreme Court cases that we have discussed, the state imposed automatic penalties on those who refused to waive their right against self-incrimination. The police officers in *Gardner* and *Garrity* and the city employees in *Uniformed Sanitation Men Association* were discharged *because* they invoked their Fifth Amendment rights and refused to testify. The lawyer in *Spevack* was disbarred for the same reason. In *Turley* and *Cunningham,* the Court declared unconstitutional New York statutes that automatically stripped government contracts and political party office from anyone who refused to waive his or her immunity.

By contrast, *Baxter v. Palmigiano,* 425 U.S. 308 (1976), concerned the question of whether prison officials *could* draw an adverse inference from an inmate's silence at a disciplinary proceeding. The Court held that the Fifth

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[12] At the preliminary injunction hearing, a parole board official testified that one offender who had been released was convicted of a relatively minor offense and had an elderly, blind mother for whom he was the sole provider.

Amendment did not forbid the state from drawing such an inference, given the civil nature of the disciplinary proceeding.[13] The Court distinguished *Baxter* from its previous holdings on the ground that the state did not require Palmigiano to waive his privilege, but rather said that his silence could be used against him if he did not waive it. In addition, Palmigiano could not be "automatically found guilty" as a consequence of his refusal to testify because prison regulations required that substantial evidence support a disciplinary decision. *Id.* at 317-318.[14] In finding that drawing such an inference was permissible, the Court noted that the state had not "insisted or asked" that the defendant waive his Fifth Amendment privilege. *Id.* at 317. Nor was the defendant "in consequence of his silence automatically found guilty of the infraction with which he has been charged." *Id.* On the ground that an inmate's silence "in and of itself" did not trigger a sanction, the Court distinguished *Baxter* from earlier cases such as *Garrity* and *Turley*. *Id.* at 317-18.

We recently relied on *Baxter* and its reading of precedent in rejecting an attorney's claim that her testimony

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[13] *Baxter* noted that no criminal proceedings were pending against Palmigiano and distinguished the case from earlier holdings in part on that ground. *See Baxter*, 425 U.S. at 317. However, this court has applied *Baxter* in cases involving criminal charges. *See, e.g., United States v. Stein*, 233 F.3d 6, 16 n.5 (1st Cir. 2000).

[14] *Cunningham* distinguished *Baxter* on this ground, stating: "Respondent's silence in *Baxter* was only one of a number of factors to be considered by the finder of fact in assessing a penalty, and was given no more probative value than the facts of the cases warranted; here, refusal to waive the Fifth Amendment privilege leads automatically and without more to imposition of sanctions." *Cunningham*, 431 U.S. at 808 n.5.

before the Massachusetts Board of Bar Examiners was coerced because she believed that she would be disbarred if she remained silent. *See United States v. Stein,* 233 F.3d 6 (1st Cir. 2000), *petition for cert. filed,* (U.S. Feb. 26, 2001) (No. 00-1354). We discussed the automatic penalties faced in *Gardner* and *Garrity,* and concluded:

> Where, however, invocation of the Fifth Amendment does not, by itself, result in forfeiture of the job or license in question, the fact that claiming the Fifth may, as a practical matter, result in damage to one's chances of retaining the privilege at stake does not necessarily establish a constitutional violation.

*Id.* at 15. Three related facts led us to reject the attorney's claim. She was not subject to automatic disbarment for remaining silent; the Board of Bar Examiners was not required to disbar her; and the board had no formal rule or unwritten policy or practice of disbarring attorneys for invoking their Fifth Amendment privilege. *See id.* at 16.[15]

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[15] The Second Circuit relied on a related rationale in two cases cited by the defendant, *Asherman v. Meachum,* 957 F.2d 978 (2d Cir. 1992) (en banc), and *Johnson v. Baker,* 108 F.3d 10 (2d Cir. 1997). In *Asherman,* the court found that revocation of a prisoner's supervised home release for his refusal to answer questions at a psychiatric evaluation did not violate the Fifth Amendment. In *Johnson,* the court found that an inmate's Fifth Amendment rights were not violated by a sex offender treatment program that required admissions of past misconduct, and that was a prerequisite for a program that allowed inmates to spend extended time with their families. Both cases distinguished between a state's adverse action against an individual for invoking the right to self-incrimination and an action taken "for failure to answer a relevant inquiry." *Asherman,* 957 F.2d at 982. The court found that the inquiries made of the defendants in these cases were relevant to the state's public responsibilities. *Id.* at 983. In *Johnson,*

(Continued on following page)

Parallel facts are present here. The plaintiffs do not automatically lose parole eligibility because they remain silent, the parole board is not required to deny them parole, and the board has no formal rule denying parole to sex offenders who do not complete the SOP. *See, e.g., Lile*, 224 F.3d at 1182 (inmates required to admit past misconduct for admission to a sex offender treatment program could not show Fifth Amendment compulsion based on denial of parole because they were not required to complete the treatment program for parole eligibility). According to the plaintiffs, the board does have such an unwritten policy or practice. But the defendant in *Stein* made a similar argument to no avail, and we see no reason to distinguish this case on that ground. It is entirely permissible for a parole board to take into account an inmate's efforts to rehabilitate himself by participating in a prison program designed to address his prior criminal conduct. But to say that the parole board may consider an inmate's completion of a prison treatment program is not to say that it must make a decision on that basis. That the board often weighs heavily completion of the SOP in deciding whether to parole sex offenders does not change the calculation. *See Stein,* 233 F.3d at 17 n.6 (fact that defendant "could have had good reason to fear disbarment if she did not testify is not the same as being faced with automatic disbarment for failure to testify"); *United States v. Indorato,* 628 F.2d 711, 716 (1st Cir. 1980) (fear of punishment as a result of invoking the Fifth Amendment

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these responsibilities concerned sex offender rehabilitation. *See Johnson,* 108 F.3d at 11.

does not protect against subsequent use of self-incriminating statements at a criminal trial).

### 3. Reasonable Alternatives

The third step under *Turner* requires us to consider whether reasonable alternatives exist for the government to achieve its ends without significant cost or impairment to the governmental interest at stake.

Some states address the incrimination dilemma posed by sex offender treatment programs by asking inmates seeking treatment only to admit to misconduct of which law enforcement officials are already aware. *See Neal v. Shimoda,* 131 F.3d 832, 833 n.18 (9th Cir. 1997) (citing provision of sex offender consent to treat contract stating, "I understand that I am not required to provide information about crimes that no one knows about"); *Russell v. Eaves,* 722 F. Supp. 558, 560 (E.D. Mo. 1989). Courts have also suggested that states grant use immunity to sex offenders before requiring them to disclose past misconduct during the course of treatment. *See Lile,* 224 F.3d at 1192; *Mace,* 765 F. Supp. at 852; *Fuller,* 915 P.2d at 816; *Imlay,* 813 P.2d at 985.

A grant of limited use immunity need not conflict with public safety, since it allows the state to prosecute the recipient "for any crime of which he may be guilty . . . provided only that his own compelled testimony is not used to convict him." *Cunningham,* 431 U.S. at 809 (comparing use immunity to broader transactional immunity, which immunizes witnesses from prosecution for any transaction about which they testify). Granting use immunity may in fact further the state's goal of rehabilitation by encouraging inmates to admit their sex offenses,

thus removing an obstacle to treatment. *See Lile,* 224 F.3d at 1192. Use immunity is the solution proposed by commentators concerned about the tension between an inmate's right against self-incrimination and the state's interest in pressing sex offenders to admit past misconduct as a first step toward effective treatment. *See* Shevlin, *supra* note 6, at 486; Kaden, *supra* note 6, at 350; Solkoff, *supra* note 6, at 1444. In his testimony at the preliminary injunction hearing, SOP Director Lance Messinger expressed similar concerns, saying that he tries to obtain use immunity for inmates when he thinks they could be prosecuted on new charges based on information disclosed during treatment.

This may indeed be a desirable outcome. But we agree with the district court that the decision about whether to grant immunity to sex offenders is a policy choice that lies in the state's hands. We think that it is for New Hampshire to say whether it could do so without impairing the governmental interest at stake.

#### 4. Conclusion under *Turner*

Our *Turner* analysis reflects the closeness of the Fifth Amendment self-incrimination question presented here. Given the stakes in parole and the avoidance of further prosecutions, the plaintiffs do suffer some burden in the exercise of their Fifth Amendment rights when they must choose between declining to participate in the SOP, which significantly enhances their chances for parole, or disclosing other criminal conduct. The availability of use immunity at least suggests the possibility of an alternative means of advancing the state's interest in securing inmate

participation in the SOP without necessarily compromising future prosecutions for other instances of sexual misconduct.

On the other hand, the state's interest in reducing the recidivism of sex offenders is substantial. There may be undesirable penological and law enforcement implications to the grant of use immunity in the sensitive context of sexual misconduct cases that we do not fully appreciate. The burden on the exercise of the Fifth Amendment rights of the plaintiffs is lessened significantly by the factors we have cited: the denial of parole does not impose a new penalty on the plaintiffs, the plaintiffs may choose not to participate in the SOP, and the denial of parole does not automatically follow from a decision not to participate.

Weighing these factors, and drawing upon the meaning of compulsion under the Fifth Amendment developed by the precedents we have cited, we conclude that the reduced likelihood of parole for refusing to participate in the SOP does not constitute a penalty sufficient to compel incriminating speech in violation of the Fifth Amendment.

### B. Prison Housing Transfer

The alternate basis for the plaintiffs' claim of compulsion is the transfer from South Unit to Hancock Building that often follows a refusal to participate in the SOP. The plaintiffs claim the transfer is a penalty for Fifth Amendment purposes because it significantly affects their living circumstances. This question is not close.

Plaintiffs' preference for South housing is understandable. At the preliminary injunction hearing, prison officials testified that Hancock is the prison's "low-rent

district" and compared South to a hotel. The plaintiffs cite several advantages of living in South. They have greater outdoor privileges; they live in two-man rather than eight-man cells; they live on smaller "pods," or living groups. As evidence that the move to Hancock is punitive, the plaintiffs argue that such transfers are used to punish inmates who break the rules. Some of the plaintiffs also said that even though both facilities are classified as medium security, they feel safer at South because most of the other inmates are also sex offenders. In Hancock, where they are surrounded by violent and drug offenders, they are targets of harassment and assault.

The plaintiffs' claim that the transfer from South to Hancock is a penalty for Fifth Amendment purposes fails under the *Turner* analysis. First, the state has a valid governmental interest in controlling where prisoners will be housed. Once an offender has been sentenced, New Hampshire gives broad discretion to prison officials over the "terms, conditions, and place of incarceration." *State v. Peabody,* 438 A.2d 305, 308 (N.H. 1981); *see also* N.H. Rev. Stat. Ann. § 651:25. At the hearing on the plaintiffs' petition for injunctive relief, prison officials testified that they offer housing transfers as an incentive to encourage inmates to act in particular ways. Prisoners may earn a place in South because they have a clean disciplinary record or because they participate in a treatment program like the SOP. In either case, the transfer to South is a benefit conferred on inmates who earn it. This kind of reward system easily meets *Turner*'s legitimate penological interest standard.

The second and third *Turner* factors also weigh against the plaintiffs. The quality-of-life differences between South and Hancock are not severe enough to burden the exercise of the plaintiffs' constitutional rights.

Nor is there a reasonable alternative to giving prison officials broad discretion over inmate housing. For the reasons stated, the housing transfers do not rise to the level of a penalty that establishes Fifth Amendment compulsion.[16]

## IV.

We are unpersuaded by the plaintiffs' claim that their Fifth Amendment right against self-incrimination was violated by New Hampshire's requirement that they disclose their histories of sexual misconduct to participate in a prison treatment program that affects their chances of obtaining early release on parole and of maintaining residence in desired prison housing. The defendant is entitled to judgment as a matter of law. We affirm the district court.

**Affirmed.**

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[16] We distinguish this case from *Lile v. McKune*, 224 F.3d 1175 (10th Cir. 2000), in which the Tenth Circuit found a Fifth Amendment violation where sex offenders who refused to disclose their past misconduct in order to participate in a prison treatment program were automatically transferred from a medium to a maximum security facility. The transfer resulted in loss of the following privileges: personal television; limited access to prison organizations, activities, gym, and yard; reduction in spending allowed in the canteen per pay period from $140 to $20; reduction in pay and intake property; restricted visiting privileges. *See id.* at 1181. The consequences of the transfer described in *Lile* are more severe than those the plaintiffs say accompany a transfer from South to Hancock. In addition, the transfer in *Lile* automatically followed from an inmate's decision not to pursue treatment, whereas the transfers to Hancock complained of here are likely rather than automatic. *See id.*

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Wayne Ainsworth, et al.,

Plaintiffs

v. Civil No. 99-447-M

Opinion No. 2000 DNH 121

Edda Cantor, Acting Commissioner,
New Hampshire Dept. of Corrections,

Defendant

**ORDER**

Plaintiffs, a group of 23 inmates at the New Hampshire State Prison, filed this civil rights action seeking a declaration that aspects of the prison's sexual offender treatment program violate their Fifth Amendment right against compelled self-incrimination. They also seek preliminary and permanent injunctive relief.

Plaintiffs say the sexual offender treatment program violates their rights against self-incrimination because they must fully disclose their history of sexual misconduct, including uncharged criminal conduct, as a condition of admission. And, they claim that they are "compelled" to participate in the sexual offender program (and, in so doing, provide potentially incriminating evidence against themselves) because, unless they participate: (1) they are subjected to punitive transfers within the prison; and (2) are not granted parole.

On February 3, 2000, the Magistrate Judge issued a Report and Recommendation, recommending that the court grant plaintiffs' request for a preliminary injunction,

enjoining defendants from "conditioning admission to the SOP upon admission by plaintiffs to uncharged criminal conduct, unless plaintiffs are immunized from use in any way of those admissions in any subsequent criminal proceedings." Report and Recommendation (document no. 17) at 29. Pending before the court are the parties' objections to various aspects of that Report and Recommendation, as well as defendant's motion to dismiss.

## Background

In order to participate in the prison's sexual offender treatment program, an inmate must, among other things, freely and openly accept responsibility for his past sexual misconduct (both that underlying his conviction(s), as well as any uncharged misconduct). In the professional judgment of those administering the program, such candor is essential to effective treatment. Beyond obtaining effective treatment, however, participation in the program can bring more concrete benefits as well for, generally speaking, the parole board rarely grants parole to a sexual offender if he has not successfully completed that program. So, the chances for parole substantially increase for those sexual offenders who do choose to participate effectively. On the other hand, if an inmate denies his offense conduct, or refuses to candidly disclose and accept responsibility for all past sexual misconduct, he will not be admitted to the sexual offender program, is unlikely to be granted parole, and will probably be required to serve his full sentence. There are, however, exceptions to the general rule – the parole board has, on occasion, paroled sexual offenders who did not successfully complete the program.

## Discussion

I. Defendant's Motion to Dismiss.

Plaintiffs argue that the disclosure requirement operates to compel them to provide incriminating evidence against themselves, in violation of the Fifth Amendment's protection. They say that if they refuse to acknowledge their histories of sexual misconduct, they are refused admission to the program and that, in turn, has substantial adverse consequences. So, in effect, they are "compelled" to provide self-incriminating statements because failing to do so results in a form of punishment. First, they say that if they do not participate in the sexual offender program, they are subject to transfer from one cell block to another, less desirable, cell block. Next, they claim that failure to fully disclose past sexual misconduct precludes admission to or completion of the program, which effectively precludes parole, which means they will be imprisoned for a longer period than otherwise would be the case. Neither argument, however, has merit.

A. Eligibility for Parole.

That an inmate will likely not be granted parole until he completes the sexual offender program does not, under the circumstances of this case, implicate constitutional concerns. Both this court and the New Hampshire Supreme Court have addressed this issue on several occasions. The reasoning underlying the holdings in those opinions need not be recounted again. *See Wellington v. Brodeur,* No. 96-189-M (D.N.H. Dec. 30, 1996); *Knowles v. Cunningham,* No. 96-228-JD (D.N.H. Jan. 24, 1997); *Wellington v. Commissioner,* 140 N.H. 399 (1995); *Knowles v. Warden, N.H. State Prison,* 140 N.H. 387 (1995).

It is enough to note that prisoners have no constitutionally protected liberty interest in parole. Nor does the prison violate an inmate's Fifth Amendment rights by conditioning admission to its sexual offender program upon the inmate's disclosure and acceptance of responsibility for all past sexual misconduct (both charged and uncharged). Plaintiffs are not "compelled" to relinquish their Fifth Amendment rights by the program's requirements because participation in the sexual offender program is entirely voluntary. Thus, an inmate may freely, and without coercion, determine whether it is in his best interest to participate in that program (and openly discuss his history of sexual misconduct), or decline to participate, hoping that he will be among the relatively few inmates granted parole notwithstanding their failure to complete the program. It may be a difficult choice for plaintiffs – some may rationally choose to avoid the risks of full disclosure at the cost of a realistic chance for parole; others may accept those risks to obtain valuable help and enhance their chances for parole. But, whether the State's policy choices in this regard (presumably the State would want to encourage every sexual offender to undergo treatment before release) are wise or productive is not at issue here. Those policy choices belong to the State, and the State's requirements do not violate any federal constitutional guarantees.

At this juncture, it is probably worth clarifying some confusion in the record by noting that plaintiffs do *not* claim that they are being denied parole *hearings* as a result of their failure to complete the sexual offender program. As defendant readily concedes, under New Hampshire law *all* inmates are entitled to a parole hearing after they have completed the minimum term of their

sentence, even if they are sexual offenders who have not completed the sexual offender program.

What plaintiffs *do* claim is that satisfactory completion of the sexual offender program "is a de facto requirement of parole," saying that it is "common knowledge that a sex offender will not be paroled until he has completed the program." Amended Petition for Declaratory and Injunctive Relief (document no. 13) at 7. Plainly, however, evidence introduced at the preliminary injunction hearing flatly refutes plaintiffs' claim. Some inmates (albeit relatively few) are paroled notwithstanding their failure to complete the program, though that fact is not critical because no inmate enjoys a right to parole.

Returning to defendant's motion to dismiss, however, it is clear that the State may legitimately consider an inmate's failure to complete the sexual offender program as a factor counseling against granting that inmate parole. *See Brooker v. Warden,* No. 98-466-JD, slip op. at 13 (D.N.H. June 22, 1999). *See also Doe v. Sauer,* 186 F.3d 903, 906 (8th Cir. 1999) ("the denial of parole is permissible if it is based on the prisoner's refusal to participate in his rehabilitation and not based on his invocation of his privilege."). That the State considers an inmate to be a more attractive candidate for parole if he completes the sexual offender program, a point that hardly seems arguable in light of the State's interest in protecting the public, does not amount to unconstitutional "compulsion" to participate in the treatment program. As this court (DiClerico, J.) held in *Brooker*:

> A voluntary statement or interview . . . even when given in the hope of improving the inmate's chances for parole, is not compelled and,

> therefore, is not protected by the Fifth Amendment. . . . Offering the possibility of earning a benefit is certainly an incentive to participate, but it is not coercion. In other words, the possibility of parole is a carrot, not a stick.

*Brooker v. Warden,* No. 98-466-JD, slip op. at 12 (D.N.H. June 22, 1999) (citations omitted). *See generally Ohio Adult Parole Authority v. Woodard,* 523 U.S. 272 (1998) (holding that inmate faced with decision to accept death sentence or voluntarily testify at clemency hearing, at which he would likely be asked to provide self-incriminatory information, was not "compelled," within the meaning of the Fifth Amendment, to incriminate himself). Sentenced prisoners are not deprived of any constitutional right under these circumstances if they are required, or choose, to serve the full sentence lawfully imposed.

Little more need be said. This court (and others) have previously addressed and rejected plaintiffs' claim that conditioning participation in the sexual offender treatment program on therapeutic cooperation, i.e. acceptance of responsibility for all prior sexual misconduct, amounts to a Fifth Amendment violation. As to that claim, plaintiffs' petition fails to state a viable cause of action.

B. Transfers for Non-Participating Inmates.

Plaintiffs' remaining argument is that they are being unconstitutionally compelled to provide self-incriminating statements in order to avoid being transferred from the prison's South Unit to H-Building. Specifically, they say:

> Most sex offenders (and most plaintiffs) are classified as medium custody inmates and are housed in a unit within the state prison called

> "South." South's inmate population consists of about 90% sex offenders. Those who "refuse" the SOP (by denying guilt, pursuing appeals or collateral attacks on their convictions, and/or refusing to disclose other victims or offenses) are "punished" by being transferred from South unit to Hancock Building, or "H-Building." Those who fail the SOP once admitted (e.g., for refusing to disclose other victims, minimizing guilt, etc.) are also transferred to H-Building. Although H-Building also contains medium security inmates, it contains the more troublesome medium custody inmates and the conditions of H-Building and the consequences of being moved to H-Building are sufficiently more restrictive than South, so as to give rise to the compulsion to invoke the Fifth Amendment privileges.

Amended petition at 10-11.

While thoughtfully presented, plaintiffs' argument lacks force. Just as inmates have no constitutionally protected interest in being confined in a particular prison, they have no constitutionally protected interest in being confined in a particular section or cell block of a prison. *See Meachum v. Fano,* 427 U.S. 215, 224 (1976) ("The initial decision to assign the convict to a particular institution is not subject to audit under the Due Process Clause, although the degree of confinement in one prison may be quite different from that in another. The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in any of its prisons."). *But cf. Vitek v. Jones,* 445 U.S. 480, 493 (1980) (holding that the transfer of an inmate from a prison to a mental hospital did implicate a liberty interest because placement in the mental hospital was "not within the range of conditions of confinement to which a prison sentence subjects

an individual," and because it brought about "consequences . . . qualitatively different from the punishment characteristically suffered by a person convicted of crime.").

Here, while plaintiffs claim that life in H-Building is less pleasant than that in South, they do not assert that it is "qualitatively different from the punishment characteristically suffered by a person convicted of a crime." That prison officials might choose to reward those inmates who elect to participate in the sexual offender program by assigning them to South also does not amount to state-sanctioned "compulsion" to participate in [sic] program. As Judge DiClerico noted, "[o]ffering the possibility of earning a benefit is certainly an incentive to participate, but it is not coercion." *Brooker,* slip op. at 12.

To be sure, some courts have concluded that prison authorities violate an inmate's Fifth Amendment rights when they punish him or withhold a benefit because he invokes his privilege against self-incrimination in a context in which he might expose himself to criminal liability. *See McMorrow v. Little,* 109 F.3d 432, 435 (8th Cir. 1997) (collecting cases). Here, however, plaintiffs are exposed to transfer from South not because they have invoked Fifth Amendment rights, but because they have chosen not to enroll (or meaningfully participate) in the sexual offender program. The distinction is an important one because prison authorities may deny benefits to inmates who refuse to participate in prison programming or who refuse to divulge information essential to the proper administration of that program. *See, e.g., Asherman v. Meachum,* 957 F.2d 978, 982-83 (2d Cir. 1992) (en banc) (concluding that prison authorities were entitled to revoke an inmate's supervised home release after he

refused to discuss the details of his criminal conduct, notwithstanding the fact that providing such details entailed the risk of self-incrimination); *McMorrow,* 109 F.3d at 436 ("prison officials may constitutionally deny benefits to a prisoner who, by invoking his privilege against self-incrimination, refuses to make statements necessary for his rehabilitation, as long as their denial is based on the prisoner's refusal to participate in his rehabilitation program and not his invocation of his privilege.").

As noted above, plaintiffs do not claim that they are being transferred as a form of punishment for having invoked their Fifth Amendment rights. Instead, they say that they are subject to transfer for failure to enroll in (or satisfactorily complete) the sexual offender program. Transfers within the prison on that basis do not infringe plaintiffs' constitutionally protected rights. Nor do such transfers constitute any sort of "compulsion" to waive their Fifth Amendment rights.

II. The Report and Recommendation.

At this juncture, the court pauses to address the Magistrate Judge's Report and Recommendation because, if one of the premises underlying that report is correct, it obviously undermines the court's disposition of defendant's motion to dismiss, as well as its decision not to accept the Magistrate Judge's recommendation that a preliminary injunction be issued.

Although not advanced by plaintiffs in their petition, the Magistrate Judge considered whether prison authorities could lawfully refuse to even *consider* an inmate for parole if he had not completed the sexual offender

program. Defendant has readily acknowledged that, under New Hampshire law, inmates do enjoy a statutory right to a parole hearing following completion of the minimum term of their sentence (it is parole itself, not a parole hearing, to which they have no right). Consequently, as the Magistrate Judge noted, if prison authorities refused to grant a statutorily qualified inmate a parole *hearing* until he first completed the sexual offender program, that inmate might have a legitimate basis for complaint.

However, the evidence adduced at the hearing suggests that the prison does, in fact, consider all eligible inmates for parole (and occasionally actually grants parole to sexual offenders who have not completed the treatment program). No evidence was presented establishing that *any* plaintiff was eligible for, but was denied, a parole hearing simply because he had not completed the sexual offender program. John Eckert, Executive Assistant to the Parole Board, testified that successful completion of the sexual offender program is just a factor, among others, the Board considers when deciding whether to grant parole, albeit a significant factor. He also testified that "a handful [of inmates] a year, two or three perhaps" are granted parole notwithstanding the fact that they have not completed the program. (That number represents somewhere between 3% and 6% of all sexual offenders paroled annually.) Lance Messinger, Director of the Sexual Offender Program, provided similar testimony. Finally, none of the plaintiffs who testified at that hearing said that he had been denied a parole *hearing* simply based upon his refusal to participate in the sexual offender program. In fact, plaintiffs' amended petition acknowledges that

at least one plaintiff was granted a parole hearing notwithstanding his failure to participate in the program. *See* First Amended Petition, at para. 4(q).

In any event, plaintiffs' petition does not assert that they have unlawfully been denied parole *hearings*. *See generally* First Amended Petition for Declaratory and Injunctive Relief (claiming only that satisfactory completion of the sexual offender program is a de facto condition of parole, *not* a precondition to receiving a parole hearing). A claim that plaintiffs have been denied all *consideration* for parole describes a different case that must be presented in a new complaint; of course, under the strictures of Fed. R. Civ. P. 11. At this point, however, it would be inappropriate for the court to rule on a claim that was neither presented in plaintiffs' petition nor addressed in the parties' subsequent filings.

III. Fifth Amendment Concerns and Immunizing Inmates.

Finally, the court briefly addresses a concern identified in the Report and Recommendation. The Magistrate Judge alluded to a problem arising from the requirement that participants in the sexual offender program disclose and accept responsibility for all past sexual misconduct, including both charged and uncharged conduct. Because inmates are not granted any sort of immunity from prosecution (and because evidence produced at the hearing suggests that they might well be prosecuted for such conduct), the program's requirements create a strong disincentive for some inmates to participate. That disincentive is unfortunate (and perhaps unintended) since statistics maintained by the State suggest that participants in the sexual offender program are far less likely to

re-offend than are those offenders who receive no treatment. The State's data suggest that the public may be better served if, prior to his release, a sexual offender participates in (and successfully completes) the treatment program.

Nevertheless, whether to grant immunity (and thereby eliminate an impediment to some inmates' meaningful participation) is a policy matter committed to the State's discretion. This court cannot prescribe the criteria for admission to the sexual offender treatment program, or extend immunity to its participants.

## Conclusion

Defendant's motion to dismiss (document no. 8) is granted. Plaintiffs' claims that the completion of the sexual offender program is a "de facto" condition of parole and that the risk of transfer within the prison amount to unconstitutional compulsions to waive their Fifth Amendment right against self-incrimination fail to state viable causes of action. The Clerk of Court shall enter judgment in accordance with this order and close the case.

**SO ORDERED.**

Steven J. McAuliffe
United States District Judge

May 18, 2000

cc: Michael J. Sheehan, Esq.
Daniel J. Mullen, Esq.

UNITED STATES DISTRICT COURT,
DISTRICT OF NEW HAMPSHIRE.

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|---|---|
| Wayne Ainsworth, et al. | Civil No. 99-447-M. |
| v. | Opinion No. 2000 DNH 036 |
| Edda Cantor, Acting Commissioner N.H. Dept. of Corrections, et al. | |

## REPORT AND RECOMMENDATION

Plaintiffs are 23 inmates at the New Hampshire State Prison who brought this action seeking review of the prison's sexual offender rehabilitative programs, which they claim deprive them of their right against self-incrimination in violation of the Fifth Amendment. They moved for a preliminary injunction, which was referred to me for a recommendation of disposition. *See* 28 U.S.C. §§ 636(b)(1) (B). An evidentiary hearing was held on December 22, 1999, at which four plaintiffs and four prison officials testified. After carefully considering the evidence and legal arguments submitted by both sides, for the reasons set forth below, I recommend that the motion for preliminary injunction (documents no. 5), and the amended petition for injunctive relief (document no. 13), be granted.

### Discussion

#### 1. Background

Plaintiffs are all convicted sexual offenders. As part of its rehabilitation programs, the New Hampshire State Prison ("NHSP") offers two sexual offender programs, an "Intensive Sexual Offender Program" and an "Enhanced

Relapse Prevention Program." *See* Plaintiffs' Exhibit 1, NHSP Sexual Offender Programs manual. The manual explains "[t]he major difference between the two programs are quantitative, not qualitative," as "the basic admission criteria, program objectives and goals and completion requirements are the same for both [programs]." *Id.* at 10. Accordingly, I will refer to both programs by the single acronym, the "SOP."

Most convicted sexual offenders are required to successfully complete the SOP before being considered for parole. Those sexual offenders who participate do so because participation was required as part of the sentence imposed, or it was recommended by a prison official, or it could lead to a reduced sentence or earlier release on parole. Not all those recommended for the program, however, actually complete it. There are more inmates who need the SOP than it can accommodate. As a result, admission to the program is selective.

Admission to the SOP follows a set procedure. The inmate must initiate the process, by requesting programming with his correctional counselor or case manager. *See id.* at 3. The counselor then submits a referral form to the program coordinator, who enters the information received into a sexual offender data base which tracks all referred offenders. *See id.* When the inmate is within two years of his minimum parole date, he is interviewed to determine whether he meets the program's eligibility requirements. Those eligibility requirements include, among other things, that the inmate "admits offending [conduct] which is consistent with victim reports." *See id.*, "Selection Criteria." If he satisfies the other remaining criteria, generally the inmate will be assigned to either SOP program depending on his treatment needs. *See id.*

Evidence elicited at the hearing demonstrated that inmates are not admitted to the SOP if they refuse to accept responsibility not only for the offense[s] for which they were convicted, but also for any other reported offenses.[1] Plaintiff Donald Carter testified that he has been denied admission because he refuses to admit to sexually assaulting a daughter named Kelly. This testimony was substantiated by the prison's response to his third request for admission, when Lance Messinger, the director of the SOP, replied to Carter, "Are you now willing to admit your offending against Kelly?" Plaintiff's Exhibit 5. Another plaintiff, Carl Graf, testified that he has been denied admission to the SOP because he refuses to accept responsibility for the offense which led to his incarceration. He had testified at his trial that he was not guilty of the charges lodged against him, and his conviction is on appeal; however, if he participates in the SOP he could get two years taken off his minimum sentence. The remaining two plaintiffs who testified, Wayne Ainsworth and Kevin Badger, have been denied access to the SOP because each refuses to admit guilt of their crimes of conviction because each of them claims to be innocent.

Once in the program, continued acceptance of responsibility for past sexual misconduct is expected of the inmate. Messinger testified that being "open and honest"

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[1] The program anticipates offenders will admit to their entire deviant sexual history, whether or not known to prison officials; however, if specific offenses have been reported by victims and are, therefore, known by the prison, the evidence showed that, at a minimum, the NHSP required the offender to acknowledge that particular behavior.

about past deviant sexual conduct was a critical component of rehabilitation. *See e.g., id.* at 9 (listing among the criteria for program completion acceptance of "full responsibility . . . for offending without minimizing or blaming others"). In Phase I of the SOP, clinical group therapy requires participants to provide "full and open disclosure, sexual autobiography, contributing factors in offending." *Id.* at 5. These disclosures, however, are not protected by any grant of immunity or assurance of confidentiality. The SOP "Treatment Contract," *id.* at 12, specifically provides for the participant to agree to sign an "Acknowledgment of Confidentiality" waiver.

Messinger testified that although he is concerned about how the program affects inmates' right against self-incrimination, he does not have the authority to immunize his patients from potential criminal liability for admissions made in the program. Evidence elicited at the hearing demonstrated that at least one participant was prosecuted for an offense admitted during treatment. Messinger explained that he has a duty to report uncharged offenses learned of during treatment and, although he tries to arrange for immunity, the decision whether to pursue charges lies with the appropriate prosecuting authorities.

John Eckart, the executive assistant to the N.H. Adult Parole Board, testified that among the factors considered by the Parole Board is whether the inmate has completed the SOP and that, as a general rule, a sexual offender will not be considered for parole unless he has completed the SOP. A few sexual offenders, however, are released without

having completed the SOP while incarcerated, but only about two or three annually.[2] Other sexual offenders are paroled without completing the SOP if they were not designated to receive the institutional program, but those parolees receive community based sexual offender rehabilitation programming.[3]

Finally, the evidence showed that prisoners at the NHSP are moved from one building to another for a variety of reasons, including as incentive for desired behavior and as punishment for aberrant behavior. Although plaintiffs claim they are punished for not participating in the SOP by being moved from "South" building, a desired housing location, to "Hancock" or "H" building, a less desirable alternative, the evidence failed to substantiate that contention. Both buildings are medium security housing units, although the testimony consistently described South as the preferred housing assignment because of its accommodating features. The NHSP generally tries to move sexual offenders into South as an incentive to participate in the SOP, and when such moves are made others are transferred out of South who have not cooperated with the prison's rehabilitation efforts. The evidence demonstrated that most of the prison's sexual offender population is housed in South, but sexual offenders are dispersed throughout the institution. Testimony at the hearing suggested the NHSP had a policy of transferring

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[2] Eckart testified that between 55-75 sexual offenders have been paroled annually since 1996.

[3] In fact, the one inmate Eckart spoke of who had just been released without completing the SOP was required to participate in a community based sexual offender rehabilitation program.

uncooperative sexual offenders from South to Hancock if they refused to participate in the SOP, but, of the plaintiffs, only Ainsworth has actually been moved, and it was unclear whether his transfer was pursuant to that policy. The other plaintiffs who testified had not been moved because of their nonparticipation in the SOP.[4]

2. Standard of Review

Whether a preliminary injunction should be issued depends on the plaintiffs' showing of (1) their likelihood of success on the merits of their claims, (2) the potential for irreparable harm if the injunction is denied, (3) the balance of hardship to the plaintiffs if the injunction is denied compared to the defendant's hardship if it is granted, and (4) the effect, if any, of the court's decision on the public interest. *See Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 15 (1st Cir. 1996). "Likelihood of success is the main bearing wall of the four-factor framework." *Id.* at 16 (citing precedent). As a result, if plaintiffs are unable to convince the court that they are likely to succeed on the merits, they will not obtain the injunction sought. *See Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir. 1993) (explaining how likelihood of success is the "sine qua non" of the preliminary injunction analysis).

In this action, plaintiffs pursue the single issue of whether the SOP's "open and honest" requirement violates the Fifth Amendment by causing them to potentially incriminate themselves. Plaintiffs are not contending that

[4] Badger and Graf testified they were still housed in South; Carter has been housed in Hancock since he was first incarcerated in 1998.

they have any liberty interest in parole or in being considered for parole, or any liberty interest in being housed in a particular building at the NHSP. Instead, they weave those issues into their Fifth Amendment claim. They assert the SOP policy of requiring each participant to admit to past deviant sexual conduct before admission into or successful completion of the program exposes them to potential future criminal liability. They further contend that the NHSP practice of not considering them for parole and moving them out of favorable housing conditions into more restrictive environments if they refuse to participate in the SOP are sufficiently coercive responses to their decision not to make certain admissions to constitute the compulsion element of a Fifth Amendment violation. The success of plaintiffs' Fifth Amendment claim turns on this narrow issue, of whether the prison's response to plaintiffs' refusal to make the self-incriminating admissions constitutes compulsion.

**(a) The Merits of Plaintiffs' Claims.**

The Fifth Amendment of the U.S. Constitution, which applies to the States through the Fourteenth Amendment, *see Allen v. Illinois,* 478 U.S. 364, 368 (1986), provides "No person . . . shall be compelled in any criminal case to be a witness against himself. . . . " The privilege extends not just "to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant. . . . " *Hoffman v. United States,* 341 U.S. 479, 486 (1951) (discussing the scope of the privilege asserted before a federal grand jury). It is well-settled that the privilege

> "not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'"

*Allen,* 478 U.S. at 368 (quoting Supreme Court precedent). The privilege extends to convicted inmates to protect them from being compelled to make incriminating statements regarding any crime other than that for which they have been convicted. *See Minnesota v. Murphy,* 465 U.S. 420, 426 (1984) (discussing the scope of the Fifth Amendment privilege probationers enjoy); *see also U.S. v.. Perez-Franco,* 873 F.2d 455, 462 (1st Cir. 1989) (explaining how defendants who plead guilty are still protected by the privilege for other crimes that are not part of the agreement); *Lile v. McKune,* 24 F. Supp. 2d 1152, 1156 (D. Kan. 1998) (citing *Baxter v. Palmigiano,* 425 U.S. 308 (1976) to extend the privilege to inmates).

The Fifth Amendment problem in this case arises out of the SOP policy of requiring participants to admit to their deviant sexual history. This policy would violate the Fifth Amendment if: (1) the SOP program is considered a "proceeding," within the meaning of the Fifth Amendment; (2) if the answers sought are self-incriminating; and (3) if the answers are in some way compelled by the government. The first two elements of a Fifth Amendment claim are readily satisfied based on the facts before the court; the third element, that of compulsion, however, is more problematic. Each element is discussed below in turn.

As part of its selection process and treatment program, the SOP requires inmates to admit to and accept

responsibility for all prior deviant sexual behavior, including unreported or uncharged offenses. Because the SOP is a structured rehabilitation program with very specific admission procedures, selection criteria, and treatment goals and objectives to achieve, *see e.g.* Plaintiffs' Exhibit 1, I believe it falls within the meaning of an informal administrative proceeding, *see Allen*, 478 U.S. at 368, for purposes of this Fifth Amendment analysis. *See Perez-Franco*, 873 F.2d at 462 (applying the privilege to an interview with a probation officer conducted as part of a pre-sentence report and explaining that the privilege depends on the incriminating nature of the answers sought, not on the nature of the proceeding in which the questions are asked).

Likewise, the requirement that all participants "admit[ ] offending [conduct] which is consistent with victim reports," Plaintiff's Exhibit 1 at 3, with no grant of immunity or guarantee of confidentiality, is patently self-incriminating. The evidence was clear and consistent that an inmate would have to be "open and honest" about his entire history of sexual misconduct, including uncharged or unreported deviant behavior. *See e.g. id.* at 5 (describing group therapy in phase I of the program as requiring "full and open disclosure, sexual autobiography"), 12 (the SOP Treatment Contract's first condition requires the participant to "agree to be complete[ly] open and honest and assume full responsibility for [his] offenses and [his] behavior."). The evidence also clearly and consistently showed that such admissions could and would be used against the inmate in future criminal proceedings. *See e.g. id.* at 12, Treatment Contract, waiver of confidentiality provision. Messinger testified that although he has sought immunity for SOP participants, he has been unable to

guarantee such protection, that he has a duty to report disclosures made in the SOP, and that the prosecuting authorities determine whether to pursue charges. Clearly, then, with respect to conduct of which they have not been convicted, the inmates are required to incriminate themselves within the meaning of the Fifth Amendment. *See Hoffman,* 341 U.S. at 486-87 (explaining that the privilege may be asserted whenever it is "evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."); *see also Allen,* 478 U.S. at 368 (citing precedent to demonstrate the Supreme Court's well-settled holding that the privilege affords protection where answers might lead to future criminal proceedings).

The third and final component of a Fifth Amendment violation, that such self-incriminating statements are compelled by the government, is the critical element of plaintiffs' claim. There is no dispute that participation in the SOP is entirely voluntary, even if it is recommended by the NHSP or as part of a sentence, because refusal to participate merely results in the inmate serving the full sentence originally imposed. The resolution of this case turns on whether there is any compulsion in this voluntary program.

Compulsion has been found where the government threatens "'potent sanctions,'" *Lile,* 24 F. Supp. 2d at 1158, or some other penalty if the answers sought are not provided. *See Perez-Franco,* 873 F.2d at 462-63 (discussing cases where the Supreme Court has found a Fifth Amendment violation because of the threatened or imposed penalty for failing to answer). An answer is not

voluntarily given if it is given only to avoid a penalty, because that denies the individual a "'free choice to admit, to deny or to refuse to answer.'" *Minnesota v. Murphy,* 465 U.S. at 429.

> In each of the so-called "penalty" cases, the State not only compelled an individual to appear and testify, but also sought to induce him to forgo the Fifth Amendment privilege by threatening to impose economic or other sanctions "capable of forcing the self-incrimination which the Amendment forbids." In most of the cases, the attempt to override the witnesses' privilege proved unsuccessful, and the Court ruled that the State could not constitutionally make good on its prior threat. These cases make clear that "a State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself."

*Id.* at 434 (citations omitted). Thus, if a substantial penalty is likely to result for failing to respond to the question asked, the incriminating disclosure is considered compelled, even if it was voluntarily given. *See Perez-Franco,* 873 F.2d at 462.

Plaintiffs argue here that the NHSP in fact compels the self-incriminating statements by (i) conditioning consideration for parole on successful completion of the SOP and (ii) transferring inmates to less desirable housing if they refuse to make the admissions and participate in the SOP. Their housing argument may be summarily dismissed, because it is well-settled that inmates have no constitutional right to any specific housing in any particular institution. *See Olim v. Wakinekona,* 461 U.S. 238, 244 (1983) (citing *Meachum v. Fano,* 427 U.S. 215 (1976) and

*Montanye v. Haymes,* 427 U.S. 236 (1976) to support the conclusion that prisoners have no liberty interest protecting them from either intrastate or interstate transfers); *see also State v. Peabody,* 121 N.H. 1075, 1078-79, 438 A.2d 305 (1981) (explaining that the warden determines the "terms, conditions, and place of incarceration once a person has been sentenced to the New Hampshire State Prison").

Moreover, the evidence was consistent that the minimal transfers which have been made have been to housing at the same custody classification. There was no evidence of punitive transfers having been made as a result of any refusal to admit prior sexual misconduct. While one prison building may be more accommodating than another, absent any evidence of a punitive transfer into a higher security level unit, the housing decisions appear to be "'within the normal limits or range of custody which the conviction has authorized the State to impose.'" *Olim,* 461 U.S. at 246-47 (quoting *Meachum,* 427 U.S. at 225). Accordingly, I find plaintiffs have failed to demonstrate that any transfers, or threat of transfers, of sexual offenders have imposed a "penalty" which could be understood as compelling them to provide the self-incriminating statements required by the SOP to establish a Fifth Amendment violation.

On the other hand, the allegation that plaintiffs are denied consideration for parole is a more onerous response. New Hampshire law reflects a clear policy to release inmates on parole as "a means of supervising and rehabilitating offenders without continued incarceration and a means by which prisoners can be aided in the transition from prison to society." N.H. Rev. Stat. Ann. ("RSA") 651-A:1 (1996). It is well-settled, however, that

release on parole is considered a privilege within the discretion of the state adult parole board, not a right prisoners can expect to have protected. *See e.g. Baker v. Cunningham,* 128 N.H. 374, 380-81, 513 A.2d 956 (1986) (holding New Hampshire law does not create a constitutional or statutory right to parole); *see also Bussiere v. Cunningham,* 132 N.H. 747, 752-52, 571 A.2d 908 (1990) (explaining how the parole board rules do not limit the board's discretion to give rise to a protected liberty interest in parole). Yet what is at issue here is not the right to be released on parole, but the right to be considered for parole. If plaintiffs have some right to be considered for parole, which the NHSP deprives them of when they refuse to provide the details of their deviant sexual history, then the NHSP has created the classic "penalty" situation which denies plaintiffs of "'the free choice to admit, to deny, or to refuse to answer,'" *Perez-Franco,* 873 F.2d at 462, that violates the Fifth Amendment.

> Under New Hampshire law, a prisoner may be released on parole upon the expiration of the minimum term of his sentence, minus any credits received pursuant to RSA 651-A:23, plus the disciplinary period added to such minimum under RSA 651:2, II-e, any part of which is not reduced for good conduct as provided in RSA 651-A:22, provided that there shall appear to the adult parole board, after having given the notice required . . . to be a reasonable probability that he will remain at liberty without violating the law and will conduct himself as a good citizen.

RSA 651-A:6, I (1996). This provision also addresses when inmates serving multiple sentences may first be considered for parole. *See* RSA 651-A:6, II. These statutes create an expectation that any inmate will be *considered for,* not

released on, parole approximately two years before the completion of his minimum sentence, adjusted to account for his prison record. [5] Thus while the right to parole must be earned and is a privilege, *see e.g. Bussiere,* 132 N.H. at 753, eligibility for parole arises automatically with the passage of time. *See* RSA 651-A:6, I. And yet, under the current system, plaintiffs are not considered for parole unless they are willing to make incriminating admissions, even though they are statutorily eligible to be considered for release on parole.

All four plaintiffs who testified at the hearing stated that they had been denied admission to the SOP because of their refusal to admit to specific criminal conduct, and none of them has been considered for parole.[6] The New Hampshire Supreme Court addressed a challenge to the SOP like that asserted here in *Knowles v. Warden,* 140 N.H. 387, 666 A.2d 972 (1995). The Court held that the SOP admission policy did not violate the Fifth Amendment because the inmate's freedom to choose not to admit his guilt or not to participate in the SOP eliminated the element of "compulsion" needed for a Fifth Amendment

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[5] This expectation is bolstered by the parole board's practice of, in fact, usually considering sexual offenders for parole approximately two years before the minimum release date based on their sentence. *See e.g.* Plaintiff's Exhibit 1 at 3 ("When an inmate is within two years of his MPD (Minimum Parole Date) or possible parole date as determined by possible sentence reduction, then an interview will be set up to determine whether or not an offender meets the program eligibility requirements.").

[6] Carter and Graf testified that if they successfully complete the SOP, not only could they be considered for parole, but they could petition the court for, in Carter's case, a suspension, and in Graf's case, a reduction, of their sentences.

violation. "The plaintiff's refusal to admit guilt will not cause him to serve additional prison time; he simply may be required to serve the sentence he received originally." *Id.* at 393. In distinguishing a case which found a Fifth Amendment violation where probation was revoked for failing to admit guilt of the crime of conviction, the Court concluded that a decision to deny parole was qualitatively different from a decision to revoke parole once granted, since the inmate's interest in parole before release is merely a hope. *Id.*

While that analysis could dispose of the present claim, the facts in *Knowles,* at least as presented by the Court, are distinguishable. First and most significantly, the plaintiff there refused only to accept responsibility for the crimes of which he had been convicted. *See id.* at 388; *see also Brooker v. Warden,* No. 98-466-JD, slip op. at 12-13 (D.N.H. June 22, 1999) (dismissing similar Fifth Amendment challenge to the SOP admissions policy where the plaintiff was "not compelled to make statements about other criminal acts"); *Knowles v. Cunningham,* No. 96-228-JD, slip op. at 7-8 (D.N.H. Jan. 24, 1997) (similar unsuccessful challenge where petitioner was required to admit guilt as to only the conduct for which he was convicted). Since the plaintiffs' conviction extinguishes their right against self-incrimination regarding the acts for which they were convicted, *see Reina v. United States,* 364 U.S. 507, 513 (1960); *United States v. Johnson,* 488 F.2d 1206, 1209 (1st Cir. 1973) ("conviction, of course, removed any claim of privilege based upon liability for that offense"); *see also United States v. Albert,* 773 F.2d 386, 389 (1st Cir. 1985) (affirming assertion of privilege not for the crime to which witness pled guilty but to protect testimony that could lead to other charges), the problem arises with the

requirement to admit to as yet uncharged crimes. *See id.; see also Johnson,* 488 F.2d at 1209-10 (explaining that conviction of one crime does not "erase[ ] the privilege as it relates to others").

Based on the record before the court, one inmate was required to do just that and was prosecuted based on his admissions, and plaintiff Carter has been expected to admit to criminal conduct his daughter Kelly has reported.[7] Carter has been denied admission to the SOP apparently only because he refuses to admit to the conduct Kelly has reported. Yet he testified that if he were to complete the SOP, the remainder of his sentence would be suspended. Thus his refusal to admit his guilt with respect to Kelly, not with respect to the other victims for whom he was convicted, is penalizing him by eliminating his ability to have the remainder of his sentence suspended. By contrast to the plaintiff in *Knowles,* here the plaintiffs seek protection for admissions regarding unreported and uncharged crimes.

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[7] The remaining three plaintiffs who testified, Ainsworth, Badger and Graf, refused to accept responsibility for the crimes for which they were convicted. Because their right against self-incrimination with respect to that conduct was extinguished by their convictions, *see Reina,* 364 U.S. at 513, they do not have a Fifth Amendment claim based on the current record of just that criminal conduct. Graf, however, testified that because his conviction is on appeal, and he took the stand during his trial and denied his guilt, he would not admit to it now. Clearly such an admission would create the risk of perjury charges based on his trial testimony. Moreover, there are 19 other plaintiffs in this action; what their individual circumstances are regarding their sexual history is not yet in evidence. Messinger's testimony substantiated plaintiffs' allegation that they are required to admit to conduct which, as yet, may not have been reported, let alone charged against them. The potential for self-incrimination, therefore, is real.

Second, the Court summarized one of the SOP objective's as requiring "self-disclosure of the inmates entire sexual offending history." *Id.; see also Knowles,* No. 96-228-JD, slip op. at 3 n.1 (finding that disclosure of sexual history was an objective of the SOP, not a criterion for admission to it). The evidence at the hearing consistently demonstrated that the SOP required the offenders to admit openly their sexual autobiography, as part of the admission procedure and group therapy. Messinger clearly testified that offenders were required to be "open and honest," which meant specific admissions which could be, and in fact have been, used against inmates in other criminal proceedings. These facts were not before the New Hampshire Supreme Court when it determined that the SOP policy, as applied to the plaintiff there, did not compel incriminating answers. Accordingly, I am not persuaded that the result in *Knowles* disposes of the issue presented here.

The facts here demonstrate that sexual offenders may not be considered for parole if they have not completed the SOP or, in other words, have not made potentially incriminating admissions about other crimes they committed in the past. Although Eckart testified that in a few exceptional cases sexual offenders have been released without completing the SOP, the evidence supported the general rule that sexual offenders must complete the SOP before the parole board will even consider whether release on parole would be appropriate.[8] A policy of denying

[8] Plaintiffs Graf and Carter are faced not just with the loss of consideration for parole, but also with the loss of a right to petition the court for a reduction and suspension of their respective sentences.

consideration for parole if an offender asserts his Fifth Amendment right may be inferred from the parole board's practice, even though it is not explicit in the parole statute or rules. *See Minnesota v. Murphy,* 465 U.S. at 435 (holding that the State there could have created the "classic penalty situation" "if [it], either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation").

In other "penalty" cases, the loss, or threatened loss, of a job, or other economic hardship has constituted a sufficient sanction to find compulsion on the part of the government. *See e.g. Minnesota v. Murphy,* 465 U.S. at 434-35 (citing cases); *Garrity v. New Jersey,* 385 U.S. 493 (1967) (threatened discharge from employment for failing to provide the incriminating answers sought constituted compulsion); *Uniformed Sanitation Men v. Commissioner of Sanitation,* 392 U.S. 280, 284 (1968) (same); *Perez-Franco,* 873 F.2d at 462-63 (summarizing Supreme Court precedent as settling "'that government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized.'"(quoting *Lefkowitz v. Cunningham,* 431 U.S. 801, 806 (1977)). Also, refusing to give credit for a statutory sentence reduction where the defendant accepted responsibility for only one count of a multi-count indictment has been held to impose a penalty in violation of the Fifth Amendment. *See id.* at 463-65; *see also United States v. Corbin,* 988 F.2d 1377, 1389-90 (7th Cir. 1993) (noting a split among the courts of appeals and citing cases consistent with *Perez-Franco*' s holding).

The evidence presented in support of this preliminary injunction motion showed that plaintiffs were not considered for parole because of their refusal to abide by the SOP

admissions policy, despite any statutory eligibility for parole consideration. If potential economic losses or longer sentences create penalties which are substantial enough to satisfy the compulsion element of a Fifth Amendment violation, then the loss of the right to be considered for parole, or to be considered for a reduction or suspension of one's sentence, would appear to be at least as onerous of a sanction. *See Perez-Franco,* 873 F.2d at 463 (finding "imprisonment is one of a wide variety of penalties which can serve to trigger a constitutional violation"); *Lile,* 24 F. Supp. 2d at 1158-59 (holding loss of privileges and transfers to maximum custody were sufficiently penalizing to compel self-incriminating admissions); *cf. Minnesota v. Murphy,* 465 U.S. at 435-37 (finding no Fifth Amendment violation because the probationer was not faced with a choice between remaining silent and having his probation revoked or incriminating himself).[9]

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[9] I reach this conclusion even in light of the Supreme Court's recent decision in *Ohio Adult Parole Authority v. Woodward,* ___ U.S. ___, 118 S. Ct. 1244 (1998). In *Woodward,* the Court held Ohio's clemency procedure did not violate the Fifth Amendment, because the challenged clemency interview was voluntary. Although the inmate was facing death and was not guaranteed immunity for any answers provided during the interview, the Court found no compulsion because any "undoubted pressures – generated by the strength of the Government's case against him – pushing the criminal defendant to [be interviewed]" did not constitute "compulsion" for Fifth Amendment purposes. *Id.* at 1253. The Court concluded that "this pressure to speak in the hope of improving his chance of being granted clemency does not make the interview compelled." *Id.* In *Woodward,* the inmate's refusal to be interviewed, however, did not eliminate his right to a clemency hearing before the parole board, a clemency recommendation to the governor by the parole board, or a final decision by the governor on the clemency issue. He, therefore, was not faced with the choice between self-incrimination or loss of his life, as some courts have found, *see e.g.*

(Continued on following page)

While ultimate success on the merits is far from certain, I find at this preliminary stage of the proceedings that plaintiffs are likely to prevail on the merits of their claim with respect to denial of consideration for parole. In other cases where no Fifth Amendment violation has been found despite the elicitation of self-incriminating answers, generally immunity has been provided by the government. *See e.g. Allen,* 478 U.S. at 367-68 (holding Illinois' requirement that sexual offenders submit to compulsory examinations under its "Sexually Dangerous Persons Act" does not violate the Fifth Amendment because the proceedings are civil and the answers provided could not be used against the offender in any subsequent criminal proceeding); *Neal v. Shimoda,* 131 F.3d 818, 833 (9th Cir. 1997) (finding no Fifth Amendment violation despite the compelled incriminating answers because any admission made could not be used against the plaintiffs); *Grand Jury Subpoenas v. United States,* 40 F.3d 1096, 1101-03 (allowing the grand jury to consider compelled statements as long as they are not the basis of future criminal prosecution against the speaker) (10th Cir. 1994); *see generally Kastigar v. United States,* 406 U.S. 441, 448

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*Searcy v. Simmons,* 68 F.Supp.2d 1197, 1201 (D.Kan. 1999) (holding that if the choice in *Woodward* between self-incrimination or loss of life was not sufficient compulsion to render the answers involuntary, then the choice between loss of privileges or self-incrimination cannot be compulsion under the Fifth Amendment), because his right and ability to be considered for clemency remained intact. By contrast, in the instant case plaintiffs' refusal to answer eliminates, for all practical purposes, any chance of being considered for release on parole or having a sentence reduced or suspended. I, therefore, still conclude at this preliminary stage in the proceedings based on that evidence which is currently before the court, that the NHSP has created a substantial penalty which compels the answers sought.

(1972) (affirming the constitutionality of immunity statutes which enable the government to obtain incriminating answers in return for immunity from prosecution based on those answers); *Minnesota v. Murphy,* 465 U.S. at 435 n.7 ("Our cases indicate, moreover, that a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination."). A similar accommodation for plaintiffs here would appear to reasonably balance the State's interest in successfully rehabilitating sexual offenders with the plaintiffs' Fifth Amendment rights.[10]

**(2) The Remaining Factors.**

The remaining factors tip the scales in favor of granting a preliminary injunction. The loss of liberty which would result from a future criminal conviction for conduct admitted to in the course of the SOP would harm the plaintiff in a manner which could not be redressed with money damages. More importantly, however, both the balancing of the equities factor and the public interest factor weigh heavily towards granting the injunction

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[10] For a discussion of efforts which have been made to balance the conflict between the State's interest in rehabilitation and public safety and the plaintiffs' interest in not incriminating themselves, see Scott Michael Solkoff, Note, *Judicial Use Immunity and the Privilege against Self-Incrimination in Court Mandated Therapy Programs,* 17 Nova L. Rev. 1441 (1993). Significantly, protecting plaintiffs from future prosecution based on admissions made during rehabilitation would not prevent the government from prosecuting a plaintiff based on evidence independently obtained. *See id.* at 1490.

sought. The evidence showed that successful rehabilitation requires inmates to admit their deviant sexual histories, and successful rehabilitation reduces the recidivism rate by as much as 50%. It is clearly in the public's interest to have these plaintiffs rehabilitated, yet the current SOP admissions policy has repelled them and has created a situation in which sexual offenders may complete their sentences and be entitled to release from incarceration without getting the mental health care so critical to the public safety. Under such circumstances and based on the current record, I find that the four factors relevant to the determination of whether or not a preliminary injunction should be granted favor granting an injunction.

## Conclusion

Accordingly, for the reasons set forth above, I recommend that the plaintiffs' request for a preliminary injunction be granted, but only as follows: defendants are enjoined from conditioning admission to the SOP upon an admission by plaintiffs to uncharged criminal conduct, unless plaintiffs are immunized from use in any way of those admissions in any subsequent criminal proceedings. This recommendation is only for a preliminary injunction, which means that, if accepted, it will be effective only for the duration of this lawsuit until the issues raised herein may be disposed of finally.

Any objections to this Report and Recommendation must be filed within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the district court's order. *See Unauthorized Practice of Law Committee v. Gordon,* 979 F.2d 11,

13-14 (1st Cir. 1992); *United States v. Valecia-Copete,* 792 F.2d 4, 6 (1st Cir. 1986).

/s/
James R. Muirhead
United States Magistrate
Judge

Date: February 3, 2000

cc: Michael J. Sheehan, Esq.
New Hampshire Dept. of Justice
Daniel J. Mullen, Esq.